88-1465

No. .....

Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Where the United States Is Seeking Lost Profits from a Private Contractor Under the Contract Disputes Act, 41 USC § 601, et seq., and No Money Damage Claim Is Being Made Against the United States, Is the Private Contractor Entitled to Have Its Liability Determined De Novo by an Article III Judicial Court and Not by an Executive or Legislative Tribunal?

2. Where the Contract Disputes Act Declares a Contracting Officer's Decision Unreviewable by Any Court or Tribunal Other Than the Article I Claims Court or an Article I Agency Board Of Contract Appeal, Does a Contractor Waive Its Right To Claim Entitlement to an Article III Adjudication by Making That Argument Before an Article I Agency Board Instead of Before the Article I Claims Court?

3. Where a Contracting Officer Declares a Default and Assesses Damages Based Upon the Mistaken Belief That He Has No Authority To Grant a Contractor's Request for an Extension on the Contract,

   (1) Does the Contract Disputes Act Permit an Agency Board of Contract Appeals To Affirm That Decision by Ignoring Entirely the Contracting Officer's Mistaken Belief, and

(2) Does the Contract Disputes Act Permit a Court of Appeals To Affirm an Agency Board by ITSELF Making Original Findings of Fact Concerning the Contracting Officer's Understanding of His Authority, Where Such Findings Are Directly Contradicted by the Contracting Officer's Sworn and Uncontroverted Testimony at the Trial Before the Agency Board?

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Gregory Timber Resources, Inc. ("GTR"), plaintiff in these consolidated cases, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the judgment in Gregory Timber Resources, Inc. v. U.S., 855 F2d 841 (Fed Cir 1988).

OPINIONS BELOW

The Opinion of the Department of Agriculture Board of Contract Appeals is reported at 87-3 BCA (CCH) ¶ 20,086 (1987) and is reprinted at Section B of the Appendix ("App B"). The Federal Circuit Opinion and Judgment is reported at App A. The order denying GTR's Petition for Rehearing and Suggestion for Rehearing En Banc is unreported and appears at App D.

JURISDICTION

The Opinion and Judgment of the Federal Circuit were respectively issued and entered on August 29, 1988. On September 12, 1988 GTR timely petitioned for rehearing and suggested rehearing en banc. The Federal Circuit denied rehearing and the suggestion for en banc

review on November 30, 1988. Under United States Supreme Court Rule 20.2 and 20.4 and 28 USC § 2101(c), a petition for certiorari is due February 28, 1989. Jurisdiction rests on 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 1 of the United States Constitution provides:

> "*** The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Three subsections of the Contract Disputes Act of 1978, 41 USC § 601, et seq., as amended by the Federal Court Improvements Act of 1982, Pub L No. 97-164 ("CDA"), are relevant here. Section 6(b) of that Act provides:

> "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an <u>appeal</u> or <u>suit</u> is timely commenced as authorized

> by this chapter." 41 USC § 605(b) (emphasis added).

The "appeal" referred to in Section 6(b) is detailed under Section 7 of the CDA, 41 USC § 606:

> "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title."

The "suit" referred to in Section 6(b) was originally detailed as a suit in the United States Court of Claims:

> "[I]n lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary."

The Federal Court Improvements Act of 1982, Pub L No. 97-164, § 161(10), substituted "Claims Court" for "Court of Claims."

STATEMENT OF THE CASE

A. The Facts. United States Forest Service Contracting Officers ("COs") declared defaults and assessed $1,350,354.00 in lost profit damages on two timber sale contracts ("Bonk" and "East Flat Creek") held by Gregory Timber Resources ("GTR"). GTR is a logging business in rural southern Oregon. (Tr. 19-20.) Prior to the default terminations, GTR requested extensions on these contracts in order to log additional timber that had blown down on another Forest Service contract (entitled "North Area Salvage"). (Tr. 41, 100; Exs. 1, 4.) The Forest Service decided on its own that this new damage was catastrophic. (Tr. 124-29, 137; Exs. 29, 30, 31.) The blowdown increased the harvest volume from the original estimate of 1.6 million board feet to 3.7 million board feet. (Tr. 116, 132-33, 136-37; Exs. 25, 28.)

The COs rejected GTR's requests in one day, without independently investigating any of the involved sales

because they mistakenly believed that they had "no authority" to extend the contracts. (App L:96a to 99a; Exs. 2, 5.) The COs incorrectly believed that they had no extension authority because the prospectus for North Area Salvage had not authorized extensions in advance. (App L:96a to 98a.) The blowdown could not have been addressed in that prospectus because it occurred after North Area Salvage had been awarded. (Tr. 124-25; Ex. 29.) The United States never argued that the COs lacked the discretionary authority to extend. (App L:99a to 102a.)

B. The Proceedings in the Board of Contract Appeals.

After the contracts were terminated and damages assessed, GTR appealed to the Department of Agriculture Board of Contract Appeals ("AGBCA"), one of two Article I tribunals made available to contractors under the CDA. GTR claimed the COs' failure to recognize their authority was a material breach of contract, excusing GTR's duties or rendering the terminations ones for the

convenience of the government. GTR also claimed entitlement to trial of its defenses by an Article III court.

The AGBCA held a trial on the merits. The COs testified that they understood, at the time of the decision, that they had no authority to extend these contracts. (App L:95a to 99a; Exs. 2, 5.) Examination by Government counsel revealed that such authority did exist. (App L:98a to 102a.) The AGBCA ignored entirely the COs' acknowledged misunderstanding of their authority and, except for minor adjustments, affirmed the COs' decisions. The AGBCA also rejected GTR's constitutional challenge on the merits.[1]

C. The Proceedings in the Federal Circuit.

On appeal to the Federal Circuit, GTR argued that the AGBCA had

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1 Since then, the Claims Court has also rejected a contractor's claim of entitlement to an Article III trial. Seaboard Lumber Co. v. U.S., 15 Cl Ct 366 (1988). An appeal is pending in the Federal Circuit under No. 88-1486.

erred in failing to address the consequences of the COs' misunderstanding of their authority. GTR also renewed its Article III claim. In a 2-1 decision, the court found that the COs did understand they had authority to extend, and had legitimately exercised discretion in denying extensions. This original finding had neither been urged by the government in its briefs nor addressed by the AGBCA. The Federal Circuit also rejected GTR's Article III claim, holding that GTR had waived its challenge by appearing in an agency board rather than the Claims Court.

In dissent, Judge Bissell concurred in rejection of the constitutional arguments but wrote for reversal on the merits. Acknowledging that the AGBCA had failed to address the issue in the first place, Judge Bissell found that the COs' admitted failure to exercise <u>any discretion</u> was established by undisputed facts and required

converting the terminations to ones for the convenience of the government. (App 17.)

Through a petition for rehearing, GTR challenged the holding of waiver and the majority's original finding that the COs had understood their authority. The court denied the petition with Judge Bissell again dissenting.

REASONS FOR GRANTING THE WRIT

The CDA affects thousands of private contractors and involves hundreds of millions of dollars in transactions every year. Under that Act, a contractor who makes no damage claim against the government is compelled to defend against government claims in an Article I tribunal. This Court should address whether a contractor from whom the United States seeks damages may claim entitlement to an Article III trial regardless of whether he makes that claim in the Claims Court or before an agency board. This Court should also address under the CDA the proper role of agency boards and courts of appeal when

reviewing damage determinations made after a CO misunderstands his authority. The very foundation of the CDA process is a reasoned disposition by an independent CO. Here, the AGBCA and Federal Circuit decisions rendered meaningless the admitted failure of two COs to understand their authority.

A. The Article III Issues.

1. Contractors Who File in an Article I Board Instead of the Article I Claims Court Are Entitled to Claim Article III Rights

Contrary to the Federal Circuit's statement, GTR does not "challenge the constitutionality of the provision of the Federal Courts Improvement Act *** that substituted the United States Claims Court, an Article I Court, for the Court of Claims, an Article III Court." (Gregory Timber Resources, Inc. v. United States, App A:1.) GTR has not argued that the Constitution requires the Claims Court to be an Article III tribunal. What GTR has argued is that when the government seeks damages against a contractor for breach

of contract and no counterclaim is alleged, Article III guarantees that contractor a trial before an Article III, i.e., judicial branch, tribunal. Between 1978 and 1982, that guarantee was satisfied. While the CDA compelled contractors to seek review in one of two forums during that period, one forum was an Article III court. An election to appeal to a contract board of appeals (an Article I forum) constituted a waiver of the right to Article III adjudication because the Article III Court of Claims was available to contractors.

After the Court Improvements Act established the Article I Claims Court in place of the Article III Court of Claims, however, contractors were still subject to the CDA restriction limiting review to either of two forums. Now, though, neither of those forums was an Article III court. The constitutional flaw is not that the Claims Court was established as an Article I tribunal. The flaw instead is that the CDA now entirely denies a contractor the historic

right to defend against a government money damage claim in an Article III tribunal.[2]

With the Court of Claims abolished, today's Article III alternative is a district court. It is the application of the CDA to deny any Article III trial and not the simple establishment of the Claims Court as an Article I tribunal, which is constitutionally offensive. It is absolutely irrelevant to that denial whether a contractor denied access to an Article III district court initiates his claim in the Article I Claims Court or an Article I board. There can be no waiver of an Article III right where the CDA

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[2] See, e.g., North American Com. Co. v. United States, 171 US 110 (1898); United States v. Buchanan, 49 US (How) 83 (1850); United States v. Linn et al., 40 US (Peters) 290 (1841); United States v. Tingey, 30 US (Peters) 115 (1831); United States v. Gurney and Others, 8 US (Cranch) 333 (1808); cf. Murray's Lessee v. Hoboken, 59 US (HOW) 272 (1856).

denies a contractor any option to proceed in an Article III forum.

2. The Panel's Failure to Address the Institutional Aspect of the Article III Claim Violates Commodity Futures Trading Com'n v. Schor, 478 US 833, 106 S Ct 3245, 92 L Ed 2d 675 (1986).

The Federal Circuit also erred in halting its analysis of the Article III issue with the erroneous finding of waiver. Article III not only preserves to litigants a personal right to impartial and independent adjudication, but it "also serves as 'an inseparable element of the constitutional system of checks and balances.'" Commodity Futures Trading Com'n v. Schor, 478 US 833, 106 S Ct 3245, 3257, 92 L Ed 2d 675, 692 (1986). This institutional interest cannot be waived. 92 L Ed 2d at 693. Indeed, in Schor itself, this Court found that while the litigant had waived his personal Article III protections, the Court still had to decide whether the grant of power to try state law counterclaims violated the institutional

aspect of Article III. The Federal Circuit decision is contrary to Schor in its failure to address the institutional aspect.

3. A Contractor Who Makes No Money Damage Counterclaim Is Entitled to Defend Against a Government Claim in an Article III Tribunal.

An action by the government against a citizen for money damages for failure to perform under a government contract, heard and decided in a non-Article III tribunal, implicates the core of the "longstanding Anglo-American tradition of an independent Judiciary." United States v. Will, 449 US 200, 217-18, 101 S Ct 471, 66 L Ed 2d 392 (1980). An independent judiciary within the constitutional scheme of separation of powers safeguards litigants from having their rights decided by judges who are insulated from political domination by the Executive or Legislative Branch. Commodity Futures Trading Com'n v. Schor, 478 US at 848.

Congress cannot withdraw from an Article III court "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." Murray's Lessee v. Hoboken Land and Improvement Co., 59 US (18 How) 272, 284 (1856). In other words, Congress cannot relegate an "inherently judicial" matter to a non-Article III court. Ex parte Bakelite Corp'n, 279 US 438, 453, 49 S Ct 411, 73 L Ed 789 (1929); Glidden Company v. Zdanok, 370 US 530, 549, 82 S Ct 1459, 8 L Ed 2d 671 (1962). Most recently this Court has stated that non-Article III courts must be limited "in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." Northern Pipeline Const. v. Marathon Pipe Line Co., 458 US 50, 59, 102 S Ct 2858, 73 L Ed 2d 598 (1982).

Whether a non-Article III court may decide a case is to be analyzed "in light of the historical context in which the Constitution was written, and of the structural imperatives of the

Constitution as a whole." Northern Pipeline Const. v. Marathon Pipe Line Co., 458 US at 64.

Thus, for example, in Murray's Lessee, where the issue was whether treasury officials could audit accounts of customs officials, this Court looked to English law at the time of the Constitutional Convention for guidance as to the nature of the judicial remedies available to the Crown under English law. Because the Court found that English law provided for summary warrants of distress against "public defaulters" like the tax collector, as opposed to a full legal process including jury trials for "ordinary debtors," the Court held that the process of the treasury officials against the customs officer did not require Article III trial.

In this case, English law at the time of the Constitutional Convention establishes that a suit by the government for money damages for breach of contract entitles the citizen-defendant to the full panoply of English rights, including

trial by jury. Sir William Blackstone, in his famed Commentaries first published in 1765, stated that the remedy whereby the Crown could recover money upon a contract was for the king's attorney general to file an "information in debt" in the exchequer court. Regarding such an information and the rights of the subject thereto, Blackstone stated:

> "It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney general, who 'gives the court to understand and be informed of' the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject." 3 Blackstone, Commentaries on the Laws of England 261 (Dawsons of Pall Mall, 1st ed reprint 1966) (emphasis added).

The English subject is protected from the king's power in this type of proceeding by the entire edifice of English law, the keystone of which is the institution of the jury as guaranteed by the Magna Carta. Blackstone states:

> "For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury." Id. at 259.

Another eminent commentator of the era, Charles Petersdorff, analyzing proceedings initiated by the Crown, stated:

> "Though justice flows from the king as its fountain, he cannot administer it personally, or authorize any deviation from the laws. The first principles of equity forbid that any one should be judge of his own cause; which may be one reason that the constitution has, by an indiscriminate dictate, deprived the crown of the power of personally interfering with the administration of justice. If this were not the case, the [crown's] prerogative, instead of being in fact subservient to, would be above, the laws, and the property of the subject would be

> defenceless." 13 Petersdorff, "A Practical Treatise On the Different Branches Of The Common Law," 698 (1830).

Upon an information on a contract debt the Crown had no prerogative. The information was nothing more than the king's form of action for debt in the exchequer court instead of the common action of debt. Cawthorne v. Campbell, 1 Anst. 205, 145 ER 846 (1790). See, e.g., Attorney General v. Cochrane, 145 ER 1154 (1810) (crown suit by information in exchequer for overpayment against defendant who had supplied tea to the navy). Thus under English law at the time of the Constitutional Convention, an action by the government on a contract debt was essentially an action at common law as "between subject and subject," wherein the party from whom the debt was to be extracted was entitled to all the protections of the common law, including trial by jury.

English common law was the law in the colonies as well as under the Constitution. Indeed, recent scholarship

indicates that the relative lack of debate over Article III at the Constitutional Convention suggests "that there was indeed a strong and broad consensus among the delegates about what courts do and about what they should do." Miller, "Cases of a Judiciary Nature," 8 St L U Publ L Rev 47, 57 n.56 (1989). The Framers of the Constitution cannot have intended United States citizens to enjoy fewer rights than they enjoyed as British subjects.

In this case the United States contends, and the AGBCA held, that Gregory Timber's rights were "public rights," and thus exempt from the exclusive purview of Article III courts. This Court thoroughly discussed the public rights doctrine in Northern Pipeline Const. v. Marathon Pipe Line Co. It stated:

> "The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and

> matters that are 'inherently . . . judicial.' [Citations omitted] For example, the Court in Murray's Lessee looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. ***
>
> "'[The public rights doctrine applies] only [in] matters the determination of which may be, and at times has been, committed exclusively to executive officers.' [Ex parte Bakelite Corp.,] 279 U.S., at 458, 49 S. Ct., at 416 (emphasis added [by the Court])." Northern Pipeline, 458 US at 69.

The Court noted that at a minimum, matters of public rights must arise "between the Government and others," Northern Pipeline, 458 US at 69, but noted:

> "It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of

> distinguishing 'private rights' from 'public rights.'" 458 US at 69 n.23 (emphasis added).

This case is one where the presence of the United States as a party is "not sufficient" to transform this case into one of public rights. No government prerogative applies, and, as Sir William Blackstone noted, in such cases "trial is had, as in suits between subject and subject." This case cannot be one of public rights because it concerns the "inherently judicial" matter of the common law rights of a citizen being sued by the government, which, as shown, are not ones that may be "committed exclusively" to executive officers for determination.

Furthermore, this case is not one of public rights because the contract rights of the United States against Gregory Timber, and Gregory Timber's contract defenses against the United States, are not congressionally created. As stated by this Court:

> "[W]hen Congress creates a statutory right

*** it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts." 458 US at 83-84 (emphasis added) (foot-note omitted).

At stake in this case are common law contract rights, not congressionally created rights. Certainly Congress can regulate the public lands and authorize its executive officers to enter into contracts with private citizens. This simple fact, however, does not transmute contract rights and defenses against suit by the government into public rights. Suits by the government upon a contract are to be tried as "between subject and subject."

Even if the facts presented in this case "arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." Northern Pipeline, 458 US at 69 n.23.

This Court's precedents honor the constitutional principle of an independent judiciary. The Court has emphatically rejected an ad hoc balancing approach to the issue of whether Congress can determine for itself when Article III courts are required, and instead has insisted upon the principled approach as

stated above. 458 US at 70 n.25. Nor has this Court succumbed to arguments of expediency which urge that Congress should be free to create non-Article III tribunals on behalf of "'specialized areas having particularized needs and warranting distinctive treatment.'" 458 US at 72 (citation omitted). The AGBCA and Federal Circuit erred in denying Article III rights to GTR.

B. This Court Should Review and Define Under the CDA the Proper Role of Agency Boards and Courts of Appeal.

1. The Majority's Decision Is Based upon an Original Finding of Fact Which Has No Support in the Record.

What a CO knew or understood is an issue of fact. Bromley Contracting Co., Inc. v. United States, 794 F2d 669, 672 (Fed Cir 1986). The majority mistakenly held, in the face of an unambiguous document and unchallenged trial admissions to the contrary, that the CO's written declaration that they had "no authority" did not reflect "a belief that he lacked authority to grant

an extension." (App A:19a-20a.) That finding is absolutely contradicted by the record. Further, it constitutes an impermissible original finding of fact by an appellate court on grounds never advanced by the government in its briefs, nor reached by the AGBCA.

The COs concluded their opinion letters denying Gregory's extension requests by stating unequivocally that each had "no authority" to extend or adjust the termination date. (Exs. 2, 5). The COs' testimony reaffirmed the plain statement of belief in "no authority."

> "Q Was it your understanding, then, that you had no authority to adjust or extend the contract?
>
> "A Yes, that's my understanding."
>
> * * * * *
>
> "Q I will repeat the question. Is it your understanding that you would have the authority to grant an extension or modification or adjustment to a green sale where the contractor agreed to

> perform a distress even though there was no intention to grant such an extension expressly stated in the prospectus or the documents of either contract?
>
> "A No, I don't have that authority. I administer the contract, period." (App L:96a-99a) (emphasis added).

In short, the record is uncontroverted that the COs believed they had "no authority."

2. An Appellate Court Cannot Supply an Original Finding of Fact to Sustain a Contracting Officer's Decision.

The majority's declaration that the CO did not mean what they said is a new and erroneous finding of fact without support in the record. Indeed, the claim that the CO did not mean what they said arose for the very first time through questions asked by the Federal Circuit during oral arguments. Had a finding been made by the AGBCA that "no authority" did not mean precisely that, such a finding could not have survived appellate review. 41 USC § 609(b). Where the finding was made originally by

the appellate majority, it is additionally erroneous as a de novo determination by an appellate court.

In Anderson v. City of Bessemer City, N.C., 470 US 564, 573, 105 S Ct 1504, 84 L Ed 2d 518 (1985), this Court held that an appellate court violates its permissible scope of factual review when it substitutes findings of its own for findings made by a district court. While this Court in Anderson was applying the "clearly erroneous" standard of review, its reasoning on the impropriety of de novo fact finding applies equally here. Indeed, consistent with Anderson and the scope of review permitted to it under the Contract Disputes Act, 41 USC § 609, the Federal Circuit has previously and repeatedly held that it cannot make de novo determinations of facts in appeals from agency boards. See, e.g., William F. Klingensmith, Inc. v. U.S., 731 F2d 805, 808-09 (Fed Cir 1984).

The AGBCA never made a finding on the issue and the government never argued at trial or in its appellate

briefs that the COs believed they had authority to extend. Consequently, GTR had no expectation that what the COs believed would be seized upon and decided by the appellate court. Chaos is invited under the CDA if a Court of Appeals may make original findings on such issues.

C. The Importance of This Case.

The very heart of the Contract Disputes Act is its assumption that contract disputes initially will be addressed on the merits by an independent CO. Where a CO misunderstands his authority and thus never addresses on the merits whether to extend a contract's term, how are courts to review a resulting default and damage determination? For thirty years the lower courts and boards have rejected defaults declared in this manner. John A. Johnson Contr. Corp. v. United States, 132 F Supp 698 (Ct Cl 1955); Schlesinger v. United States, 390 F2d 702 (Ct Cl 1968); Mid-South Contractors, Inc., 85-3 BCA (CCH) ¶ 18,210 (VABCA 1985). Here, however, the answer of the

AGBCA was to ignore the COs' misunderstanding and to place itself in their shoes and exercise discretion for them. The differing but equally unsatisfying answer of the Federal Circuit majority was to make an original finding of fact, contrary to the undisputed evidence from the COs' themselves. Neither answer is correct.

For the guidance of the government, contractors, boards, and courts, this Court should clarify and define under the Contract Disputes Act the appropriate roles of agency boards and the Federal Circuit when reviewing damage assessments based upon a CO's incorrect understanding of his authority.

It is also important for the Court to resolve whether the Congress may compel contractors to defend government money damage claims for simple breach of contract in Article I tribunals. It is likewise crucial that this court clarify

whether for purposes of Article III, only contractors in the Article I Claims Court can seek Article III guarantees.

CONCLUSION

A petition for certiorari should issue to the Federal Circuit.

Respectfully submitted,

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88-1465

No. .....

Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1598

GREGORY TIMBER RESOURCES, INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: August 29, 1988

Before FRIEDMAN, BISSELL, and MAYER, Circuit Judges. FRIEDMAN, Circuit Judge.

This is an appeal from a decision of the Department of Agriculture Board of Contract Appeals (Board), Nos. 84-319-1 and 84-320-1, upholding an award of damages against the appellant Gregory Timber Resources, Inc. (Gregory Timber) for default on two timber contracts. Gregory Timber Resources, Inc., 87-3 B.C.A. (CCH) ¶ 20,086, at

101,681 (AGBCA, August 26, 1987). The appellant challenges the award on various grounds. It also challenges the constitutionality of the provision of the Federal Courts Improvement Act of 1982 (Courts Improvement Act), 28 U.S.C. § 1491(a)(2) (1982), that substituted the United States Claims Court, an Article I Court, for the United States Court of Claims, an Article III court, as the forum in which a contractor may obtain a trial de novo of a contracting officer's decision.

We hold that the appellant cannot maintain its constitutional attack because it elected to challenge the contracting officer's decision before the Board rather than before the Claims Court. We affirm the Board on the merits of the contract claims.

I

Pursuant to the National Forest Management Act of 1976, 16 U.S.C. § 472a (1982), the Forest Service sells timber contracts to private parties to harvest timber from government lands. At

auctions in February and March 1982, Gregory Timber, as the high bidder, was awarded two contracts - Bonk #2 and East Flat Creek III.

These timber sale contracts were resales of previous contracts, purchased but not performed, by the Robert Dollar Company. Gregory Timber purchased the physical assets of the Dollar company and agreed to indemnify the company for any losses it might incur when the government resold the contracts. Gregory Timber's bids on the contracts were high enough to eliminate any potential liability to the Robert Dollar Company, and were significantly higher than the other bidders and the Forest Service's stated minimum bids.

The contracts, which required Gregory Timber to cut, remove and pay for the timber by November 30, 1983, were awarded on April 21, 1982. Since the normal operating season for harvesting timber in that area was from June 1 through October 31, this schedule allowed Gregory Timber two operating seasons to

perform the contracts. Gregory Timber submitted a plan stating that logging on the two contracts would begin September 1, 1983, during the second operating season.

Gregory Timber also had several other timber contracts with the Forest Service. In October 1981, the Forest Service awarded to it the North Area Salvage contract, which required completion by November 30, 1983. In March 1983, the appellant received the Locket #2 contract, with completion set for December 1985.

In October 1983, approximately two months before the scheduled completion date for the Bonk #2 and East Flat Creek III contracts, Gregory Timber, which had not begun performance, requested that the contracts be extended or adjusted. The contracting officer denied the request. When the contracts expired on November 30, 1983, Gregory Timber had cut no timber under them.

The Forest Service resold the contracts for less than Gregory Timber's

contract prices. The Forest Service then assessed damages for default against Gregory Timber, measured by the difference between the contract price and the resale price.

Gregory Timber appealed the contracting officer's decision to the Board which, except for a relatively minor modification, unheld the contracting officer.

The Board rejected Gregory Timber's constitutional challenge to the Board proceedings. Gregory Timber contended that the provision in the Courts Improvement Act that substituted the Claims Court, an Article I court, for the former Court of Claims, an Article III tribunal, as the forum in which a contractor could obtain de novo review of a contracting officer's decision, unconstitutionally denied it the right to an adjudication of its claim by an Article III court. The Board held that because disputes between government contractors and the government involve public rights, the resolution of such

disputes may be assigned to non-Article III tribunals.

On the merits, the Board rejected Gregory Timber's contentions that it should have been given an extension of time for performance of the contracts because (1) the alleged labor dispute that Gregory Timber asserted was responsible for its failure to perform was not an event beyond its control which, under the contract, was a condition for granting an extension; and (2) its performance of other contracts prevented it from performing the Bonk #2 and East Flat Creek III contracts. The Board also held that Gregory Timber had not met the conditions of other provisions in the contracts that would have warranted an extension. These rulings are discussed in detail in part III below.

II

Prior to the Courts Improvement Act, a government contractor who wished to challenge a decision of a contracting officer had two options under the

Contract Disputes Act of 1978, for obtaining a de novo determination of his claim. (1) He could appeal to a Board of Contract Appeals and then obtain judicial review of the Board's decision in the Court of Claims, or (2) he could file suit directly in the Court of Claims, which (through its Trial Division) would try the case. The Courts Improvement Act combined the Court of Customs and Patent Appeals and the appellate functions of the Court of Claims in the new Court of Appeals for the Federal Circuit. It also created a new Article I court, the United States Claims Court, to exercise the trial jurisdiction the Court of Claims previously had.

The effect of this structural change was to eliminate a contractor's earlier right to a trial de novo before an Article III court, the Court of Claims. Even under the prior procedure, however, a contractor who elected to appeal to a Board of Contract Appeals waived the right to a trial de novo

before a trial judge of the Article III court.

Gregory Timber contends that, at least where the government is seeking recovery from the contractor, the contractor is entitled to a de novo determination of that claim by an Article III court, and that the present statutory system, under which a contractor cannot obtain such Article III review, is unconstitutional. We do not reach that question, however, because we conclude that Gregory Timber cannot raise it in the posture of this case.

When the contracting officer assessed damages against Gregory Timber for its breach of the two contracts, Gregory Timber had the option of challenging that ruling before either the Board or the Claims Court. It elected to proceed before the Board. The effect of this election was to waive, and thus eliminate its right to, a trial de novo before the Claims Court. It now argues that the procedure it elected to follow is unconstitutional because, if it had

followed the alternative procedure, that procedure would not have provided it with the trial by an Article III court to which it asserts it would have been entitled.

If Gregory Timber wanted to challenge the constitutionality of the adjudication of government contract cases by the Article I Claims Court, the proper procedure for it to have followed was to file suit in that court. According to Gregory Timber's brief, there are 22 cases pending in the Claims Court that raised that issue. (The Claims Court recently rejected the constitutional challenge, and this court authorized an interlocutory appeal of the question. Seaboard Lumber Co. v. United States, Misc. No. 203 (Fed. Cir. June 23, 1988) (unpublished order)). Indeed, if Gregory Timber had followed that course and the Claims Court had held for it on the merits, there would have been no occasion for us to decide the constitutional question that Gregory Timber pursues. "The Court will not 'anticipate a

question of constitutional law in advance of the necessity of deciding it.'" Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (citations omitted) (Brandeis, J., concurring).

The procedure that Gregory Timber chose to follow -- appeal to the Board of Contract Appeals with appellate review of the Board's decision by an Article III court -- is the same procedure that existed prior to the Courts Improvement Act. Thus, even before the Article I Claims Court was created in 1982, the procedure Gregory Timber selected would not have given it a trial by an Article III court. By invoking that procedure in this case, Gregory Timber has waived any claim that the alternative procedure it elected not to pursue would have been unconstitutional.

Gregory Timber could have fully litigated the constitutional issue by initially seeking review and raising the issue in the Claims Court and, if that court rejected the constitutional claim

and also held against Gregory Timber on the merits, by appealing the Claims Court decision to this court. The alleged constitutional flaw in the review system that Gregory Timber challenges is in the Article I character of the Claims Court. It does not affect the validity of the Board proceedings, which the creation of the Claims Court did not change. For us here to determine the constitutionality of Claims Court proceedings in government contract cases would be to render an advisory opinion, which we cannot do. United States v. Cook, 795 F.2d 987, 994 (Fed. Cir. 1986) (and cases cited).

III

Gregory Timber contends that it should either have been excused from performance of the Bonk #2 and East Flat Creek III contracts or should have been given an extension of time for performance. It further contends that in denying an extension, the contracting officer committed reversible error because he failed to exercise the discretion he was required to exercise.

A. Gregory Timber argues that because it performed additional work on other Forest Service logging contracts, it should have been excused from timely performing the two contracts involved in this case.

One of those other contracts, the North Area Salvage contract, was scheduled to be completed at the same time as the Bonk #2 and East Flat Creek III contracts. During the winter of 1982-83, the Forest Service discovered that a substantial amount of a timber had blown down in the North Area Salvage. The Forest Service categorized the event as catastrophic, which entitled Gregory Timber to either a modification or termination of that contract. In June 1983, the Forest Service extended that contract for one year, until November 1984, and Gregory Timber agreed to remove the excess timber.

The other contract, Locket #2, involved timber that had been damaged by fire. According to Gregory Timber, the removal of that timber took precedence

over the performance of the two contracts here at issue.

The Board correctly rejected the contention that the conditions relating to those two other contracts justified Gregory Timber's failure to perform the Bonk #2 and East Flat Creek III contracts. Gregory Timber could have refused to harvest the extra timber on the North Area Salvage contract. Since Gregory Timber was entitled to a modification of that contract, it could have sought additional time for performing the two contracts here involved as a condition of logging the North Area Salvage contract. It did not. The record shows that Gregory Timber did not remove any timber from the North Area Salvage from September through November 1983 - the time during which it had planned to perform the present contracts.

The record also shows that Gregory Timber logged the Locket #2 contract in 1984 and 1985. That action was inconsistent with Gregory Timber's present claim that logging of the

Locket #2 contract took priority because the timber in that area had been damaged by fire. The fact that Gregory Timber did not harvest Locket #2 until 1984 and 1985 shows that the performance of that contract did not prevent it from timely performing the Bonk #2 and East Flat Creek III contracts by November 30, 1983.

The Board found that the underlying cause for Gregory Timber's failure to perform the latter contracts was Gregory Timber's economic decision to avoid the higher price of the timber under those contracts. As noted, Gregory Timber obtained those contracts with high bids. It chose to log the less expensive timber first. As the Board stated:

> The record indicates that Appellant processed considerable [sic] more timber than anticipated during the time frame of the present sales and the evidence suggest [sic] that the present sales did not contribute to the extra volume processed because Appellant would have had to pay higher prices for such timber than from other sales entered into by Appellant.

Gregory Timber Resources, Inc., 87-3 B.C.A. ¶ 20,086, at 101,690.

B. Gregory Timber contends that it should have been given an extension of time pursuant to clause B8.21 of the contract, which provided for "term adjustment" if

> (a) Purchaser experiences delay in starting scheduled operations or interruption in active operations either of which stops removal of Included Timber from Sale Area ... for 10 or more consecutive calendar days during a Normal Operating Season due to causes beyond Purchaser's control, including but not limited to acts of God, acts of the public enemy, acts of Government, labor disputes, fires, insurrections or floods.
>
> (b) Causes described in (a) substantially affect the disposition or processing of Included Timber during Normal Operating Seasons through their effects on primary timber processing facilities, with a resulting delay of 60 calendar days or more in use of such facilities. In such event, Contract Term Adjustment shall not extend for more than 12 consecutive months.

Gregory Timber, 87-3 B.C.A. at 101,686. The contract also included clause B8.23

allowing "term extensions" which could be granted outside of the authority of clause B8.21. The Forest Service was not obligated to grant term extensions under clause B8.23.

Gregory Timber argues that it was involved in a "labor dispute" that warranted an extension. The alleged labor dispute, however, was wholly of Gregory Timber's own choice. Gregory Timber was attempting to reduce its labor costs at a particular mill. When the union rejected a proposed wage cut, Gregory Timber closed that mill from March 5, 1982 to approximately June 1, 1982.

In properly rejecting this contention, the Board stated:

> Under Clause B8.21 Appellant is entitled to an adjustment in the contract term equal to the actual time lost during the normal operating season .... Here, there were no scheduled operations or active operations. There is no demonstrated delay of 10 or more consecutive days. The delay, if any, occurred during the March 5th through May time frame and not

> during the normal operating season which began June 1.
>
> Most significantly under the terms of B8.21(a), the cause of delay, such as the labor dispute, must be beyond Appellant's control. Here, the labor dispute was not beyond Appellant's control. Indeed, Appellant requested the wage concessions from the workers and when agreement could not be reached regarding such wage concessions, Appellant shut down the plant.

Id. at 101,689.

Moreover, since Gregory Timber did not plan to begin work on the two contracts here involved until September 1, 1983, the fact that its mill was closed for three months more than a year earlier, cannot justify its subsequent nonperformance.

C. The contracting officer's letter denying an extension read as follows:

> You requested contract term adjustment under B8.21(b) [labor dispute] .... Labor negotiations to obtain wage concessions do not constitute a labor dispute under B8.21(b), since your plants were apparently closed due to market

conditions rather than a strike by your employees.

Also, you requested early extension or contract term adjustment for operating distressed timber in more urgent need of harvesting. [North Area Salvage and Locket #2.]

Such a request may be honored only when the Forest Service intent to grant extensions or adjustments on other contracts is spelled out in the prospectus for the timber in need of urgent harvesting. This was not the case on either of the two sales mentioned in your letter.

Finally, this sale does not qualify for any waiver of the diligent performance requirements for contract term extension; all of which apply to sales sold prior to January 1, 1982.

For the foregoing reasons, I have no authority to adjust or extend the November 30, 1983, termination date of this timber sale contract.

Seizing upon the contracting officer's conclusory statement that he had "no authority" to extend the termination date of the contract, Gregory Timber asserts that those words show that

the contracting officer failed to exercise his discretion in deciding not to grant an extension. According to Gregory Timber, that ruling was legally erroneous because the contracting officer had authority to grant an extension, but failed to exercise discretion in deciding whether to do so. It asserts that the consequence of this error was that Gregory Timber's nonperformance should have been excused or the government's alleged termination of the contracts for breach should be converted into termination for the convenience of the government.

The latter point requires little discussion. The government did not terminate these contracts. The contracts expired by their own terms because the contractor did not perform them at all. Since the government did not terminate, there is no basis for converting a "termination" for breach into one for the convenience of the government.

Contrary to Gregory Timber's contention, we do not read the contracting officer's statement that he had "no authority" to extend the termination date of the contract as reflecting any failure to exercise discretion. He made that statement after explaining why the grounds upon which Gregory Timber sought an extension were unavailable to it. His conclusion that he had "no authority" to grant an extension merely stated his opinion that, considering all the circumstances, Gregory Timber had not justified the relief it sought.

We do not read the words "no authority" as indicating that the contracting officer was ruling that he was legally precluded from granting an extension. Reading his letter as a whole, it reflected his conclusion that no basis had been shown for an extension, since Gregory Timber had not satisfied any of the contractual conditions for an extension. Far from reflecting a belief that he lacked authority to grant an

extension, we think the entire letter indicates that the contracting officer properly exercised his discretion in denying an extension. Whatever may be the scope of a contracting officer's discretion to grant an extension, that discretion must be exercised in accordance with and be guided by the contractual, regulatory and statutory standards governing extensions. Gregory Timber has not shown that the contracting officer departed from any of those standards.

The Court of Claims decisions upon which Gregory Timber relies are distinguishable. Those cases involved situations where the government terminated the contract after partial performance by the contractor. See Schlesinger v. United States, 390 F.2d 702 (Ct. Cl. 1968) (only where contractor not in default is there breach by government, unless failure to perform is beyond the control of contractor and without his fault or negligence); John A. Johnson Contracting Corp. v. United

States, 132 F. Supp. 698 (Ct. Cl. 1955) (contracting officer's deferral of decision to his superior negates original incorrect denial of extension); Manufacturers' Casualty Ins. Co. v. United States, 63 F. Supp. 759 (Ct. Cl. 1946) (erroneous calculation of liquidated damages after contracting officer took no action at all). Here, in contrast, there was no termination by the government, but total nonperformance by the contractor.

CONCLUSION

The decision of the Board upholding the award of damages against Gregory Timber for default on its two contracts is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1598

GREGORY TIMBER RESOURCES, INC.,

Appellant,

v.

UNITED STATES,

Appellee.

BISSELL, Circuit Judge, dissenting-in-part.

I agree that Gregory Timber cannot maintain its constitutional attack because it elected to challenge the contracting officer's decision before the Board rather than before the Claims Court. I, however, would reverse the Board on the merits.

The issue before us on the merits is whether the contracting officer (CO) failed to exercise any discretion with respect to a requested extension such that the contract was either deemed terminated for the convenience of the

government or ended by the government's material breach of its duty of good faith and cooperation. The Board in its opinion failed to address the issue. The majority opinion merely dismisses the issue out of hand.

Although the Board made no specific finding on whether it would have been an abuse of discretion for the CO to have granted an extension, it appears to have concluded that it would have been within the CO's authority to extend.* The government in its brief does not deny that the CO had authority to extend. The government only argues that the extensions were not compelled. It follows that the CO had the discretion to grant or deny the extensions, and was not

---

* The Board stated: "[W]hile the parties could have agreed to extend the present contracts because of a more urgent need to log other timber, the parties did not agree and we, therefore, conclude that such logging does not provide a legal justification to extend the present sales." 87-3 BCA, at 101, 690.

compelled by law to either grant or deny the requested extensions.

The central issue, accordingly, is whether the CO fairly and reasonably exercised available discretion in denying Gregory Timber's extension requests and in terminating the contracts for default. Contrary to the majority's position, the CO's failure to exercise any discretion was established by the undisputed facts before the Board. Significantly, the government did not argue before this court and the Board did not find that the CO did exercise any legitimate or reasoned discretion in denying Gregory Timber's extension requests. Only the majority so holds. In my view, the CO committed legal error in failing to recognize his discretionary authority and the Board committed legal error in failing to address and resolve the legal consequences of the CO's conduct.

Additionally, the Board concluded, and the government in its brief asserts, that Gregory Timber has not proved it was entitled to an

extension as a matter of right. The majority opinion also holds that "Gregory Timber has not shown that the contracting officer departed from" the contractual regulatory and statutory standards governing extensions. Slip op. at 13. The burden, however, is not on Gregory Timber, but is on the government to prove that the CO acted correctly in refusing the requests for the extensions. Lisbond Contractors, Inc. v. United States, 828 F.2d 759, 763-65 (Fed. Cir. 1987) (government bears burden of proof on issue of the correctness of its actions when pursuing damages based upon a defaulted contract). Gregory has not claimed, and need not show for purposes of this appeal, absolute entitlement to an extension. What Gregory Timber has claimed and what the law guarantees is absolute entitlement to an exercise of informed discretion by the CO. "While a contractor is not entitled to have a termination waived, he is entitled to have the contracting officer consider the alternatives to termination." Mid-South

Contractors, Inc., 85-3 ¶ 18, 210, at 91,399 (emphasis in original).

I read the record as demonstrating that the CO gave absolutely no consideration to his authority to extend. Gregory Timber raised this issue before the Board and the Board should have addressed it. The Board did not. When a request is made for an extension that could have been granted, the CO incorrectly believed that he lacked authority to grant an extension, and the grant of an extension would have avoided a subsequent default, the contract must be treated as having been terminated for the convenience of the government. Schlesinger v. United States, 390 F.2d 702, 707-10 (Ct. Cl. 1968); John A. Johnson Contr. Corp. v. United States, 132 F. Supp. 698, 705-06 (Ct. Cl. 1955); Mid-South, 85-3 BCA at 91,399.

APPENDIX B

BOARD OF CONTRACT APPEALS
UNITED STATES DEPARTMENT OF AGRICULTURE

GREGORY TIMBER RESOURCES,	AGBCA No. 84-319-1 AGBCA No. 84-320-1
Appellant	
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DECISION OF THE BOARD OF CONTRACT APPEALS

August 26, 1987

OPINION BY ADMINISTRATIVE
JUDGE EDWARD HOURY

These appeals arose under Contract Nos. 065062 and 065179, respectively, between the Forest Service (FS), United States Department of Agriculture and Gregory Timber Resources, Inc. (Appellant). The contracts were for the sale of timber on the Rogue River National Forest in Oregon. The sales were known as the Bonk #2 and East Flat Creek III sales, respectively. The contracts were awarded April 21, 1982, and required the removal of the included timber by November 30, 1983. Appellant failed to cut the timber by November 30, 1983, and the Forest Service resold the timber for less than the amounts under Appellant's contracts. The Forest Service assessed damages against Appellant based upon the resales in the amount of $611,475.33 and $738,878.56, respectively, plus interest. Appellant filed timely appeals.

Appellant did not object to the Board's jurisdiction in its Notice of

Appeal or in the Complaint. After service of the Answer and the Appeal File, a hearing was scheduled. Subsequently, Appellant filed a Motion For And Memorandum In Support Of Stay Regarding Jurisdiction. Appellant alleged that neither the Board nor the Claims Court had jurisdiction over the appeals, that neither tribunal was an Article III court, and that Appellant was entitled to adjudication of its claim by an Article III court and by a jury in such court. Appellant's position is that at the time of award, under the Contract Disputes Act (CDA), 41 USC 601-613, it had a direct access option to the Article III Court of Claims, but that the Federal Court Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25, eliminated this option after award. The Board denied Appellant's request for a stay and reserved ruling on the question of jurisdiction until a decision on the merits could be rendered. The hearing was conducted as scheduled.

In defense of its failure to cut and the assessments arising therefrom, Appellant alleges that (1) the Forest Service wrongfully refused to extend Appellant's contracts because of a labor dispute at one of Appellant's plants, contrary to the terms of the contracts; (2) Appellant agreed to remove additional quantities of distressed timber under other contracts with the Forest Service, and that this fact should have excused Appellant's failure to timely remove the timber under the present contracts; and (3) the damages assessed are excessive because the Bonk resale contract provided for a shorter term for removal of the timber than Appellant's contract and that such shorter term rendered the resale contract less valuable than Appellant's contract. Appellant also contests the imposition of interest by the Forest Service on the amounts assessed. Prior to consideration of the Findings and the discussion of the merits, we will consider Appellant's

constitutional challenge to the Board's jurisdiction.

BOARD'S JURISDICTION/CONSTITUTIONALITY OF CDA AS AMENDED BY FCIA/ GOVERNMENT CLAIMS

Appellant's Position

Appellant's position is that at the time of award on April 21, 1982, the Disputes Clause of the contract incorporated by reference the CDA and that the CDA allowed Appellant direct access to an Article III court, the Court of Claims, for disputes arising under the contract. Subsequent to award, on October 1, 1982, the FCIA became effective which substituted the Article I Claims Court for the Article III Court of Claims, thereby eliminating the direct access for the Article III adjudication of disputes. Appellant's position, citing Northern Pipeline Const. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858 (1982), is that Article III adjudication must be present at all stages of the litigation process and that, therefore, mere review of a Board

or Claims Court decision by the Article III Court of Appeals for the Federal Circuit is insufficient to meet the necessary constitutional requirements. Appellant alleges that Article III adjudication is particularly important in appeals such as the present involving claims by the Government against contractors, since these do not involve waivers of sovereign immunity. Appellant appears to concede that where the claimant in the contractor, the Government may waive its sovereign immunity in any manner it deems appropriate including the requirement to adjudicate the dispute in a non-Article III court. Cf. Constitutionality of Article I Court Adjudication of Contract Disputes Act Claims, ABA Public Contract Law Journal (Vol. 16, No. 2, May 1987). In its Memorandum, Appellant states:

> The very nature of agency boards of contract appeal raises potential for partiality, particularly when the agency is seeking money from a private party. The Department of Agriculture is not an "impartial" bystander to disputes

> such as this but has a direct financial interest in the outcome. Yet in cases such as this the Board interprets contracts prepared by the agency and resolves disputes with private parties in a manner that has a direct financial impact on the agency. GTR stresses that it is the potential for partiality, and not any suggestion of actual impropriety by board members, that mandates entitlement to the protection of Article III adjudication.

Appellant also relies on Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 3334-5 (1985) and Commodity Futures Trading Comm'n. v. Schor, 106 S. Ct. 3245, 54 USLW 5096, 5101 (July 7, 1986).

The Government's Position

The Government's position is that administrative agencies are without jurisdiction to declare unconstitutional, an act which they must administer, citing People ex rel Comm'r. of Agriculture v. Webster, 570 P.2d 560 (1977), and Buckeye Industries, Inc. v. Secretary of Labor, 587 F.2d 231 (5th Cir. 1979). See also Johnson v. Robison, 415 U.S. 361, 368, 94 S. Ct. 1160, 1166 (1974). The Government

also alleges that Appellant waived any constitutional challenge it may have had by signing the contracts on April 21, 1982, after enactment of the FCIA on April 2, 1982.

The Board May Consider the Constitutional Challenge to Its Jurisdiction.

The status of the boards of contract appeals as administrative agencies as opposed to Article I courts is far from clear. See Northern Pipeline, supra, Justice White's dissent at 458 U.S. 113. Even prior to enactment of the CDA, the Supreme Court recognized that the boards of contract appeals acted in a judicial capacity. United States v. Utah Constr., 384 U.S. 391, 421 (1965). In enacting the CDA, Congress sought to further increase and enhance the independence, impartiality and professional nature of the boards. It did so by granting board members immunity from removal without cause, 41 USC 607(b); by permitting the boards to grant the same relief in contract disputes as the Claims Court, 41 USC 607(d); by

granting board decisions great weight and finality by permitting review only by the Court of Appeals for the Federal Circuit, 41 USC 609(b); and by establishing the pay of board members at the GS-16 through GS-18 levels, 41 USC 607(b). Therefore, whatever restrictions may be imposed on so-called administrative agencies to adjudicate constitutional matters do not clearly apply to the boards. Moreover, the boards are bound to inquire into the basis of their jurisdiction, since a decision or ruling without such jurisdiction is a nullity. Comsat General Corp., DOTCAB No. 1226, 83-2 BCA ¶ 16,870. In any event the Board's determination as a purely legal matter, as opposed to a factual matter, is essentially subject to de novo review by the Federal Circuit.

Board of contract appeals have decided the constitutionality of contract clauses, regulations and statutes, Westinghouse Electric Corp., ASBCA No. 25787, 85-1 BCA ¶ 17,910; Old Hickory Services, GSBCA No. 6259, 82-2 BCA

¶ 15,972, albeit not the constitutionality of the CDA. We note that Article I courts decide questions of constitutionality. United States v. Mathews (CMA 1983), and that, in particular, the Claims Court can and does decide questions of constitutionality, 28 USC 1491(a)(1); Allied-General Nuclear Services v. United States, 12 Cl. Ct. 372 (1987), fn. 11; United States v. George S. Rush, 804 F.2d 645 (Fed. Cir. 1986). We conclude that the Claims Court has the authority to decide the constitutional question presently before the Board. The board is empowered under 41 USC 607(d) to grant the same relief to a litigant asserting a contract claim in the Claims Court. Indeed, Congress has gone to great lengths to ensure that the boards have a parity in remedies with the Claims Court. See Amendments to Equal Access to Justice Act, Pub. L. No. 99-80, October 5, 1985, 99 Stat. 183. Accordingly, for all reasons set forth above, we conclude the Board has the authority to decide the constitutional issue presently before it.

The Waiver Of Constitutional Challenge Issue.

We do not agree with the Government's position that Appellant waived any constitutional challenge it may have had by signing the contract on April 21, 1982, after enactment of the FCIA on April 2, 1982. As indicated in FF 3, infra, the bid auctions for the sales here in issue occurred February 26, 1982, and March 19, 1982, and Appellant was determined to be the high bidder. congress enacted the FCIA on March 22, 1982; the President signed the bill on April 2, 1982; the contracts were awarded to Appellant on April 21, 1982, and the FCIA became effective October 1, 1982. At the time of bid submission and bid action and the determination that Appellant was the high bidder, the FCIA had not been approved by Congress, let alone enacted or effective. Appellant could not have properly withdrawn its bid or refused award of the contracts after bid opening and being determined to be the high bidder. Accordingly, we

conclude that Appellant did not waive the constitutional rights it may have had by entering into the contract after enactment of the FCIA.

Appellant's waiver of its constitutional challenge, it any, as a result of subjecting itself to the jurisdiction of this Board, presents a more difficult question. Commodity Futures Trading Comm'n., supra. In Commodity, petitioner did not elect the Article III court option available but elected instead to seek relief in the non-Article III forum which was also available. The Court held that petitioner waived his challenge. Here, Appellant has no Article III option but rather two non-Article III options for adjudication of the claims in issue, the Board's, or the Claims Court, as a result of the FCIA amendment of the CDA. To this extent the statutory scheme here is distinguishable from the one available to petitioner in Commodity. We note that Appellant may have been able to bring its constitutional challenge in an

Article III Federal District Court, particularly in Appellant's home circuit. Cf., North Side Lumber Co. v. Block, 753 F.2d 1482 (9th Cir. 1985), cert. denied, 473 U.S. 1307, 106 S. Ct. 4, 106 S. Ct. 248 and 106 S. Ct. 265 (1985); Hoskins Lumber Co. v. Lyng, 822 F.2d 61 (9th Cir. 1987, not published). See also Megapulse, Inc. v. Drew Lewis, 672 F.2d 959 (D.C. Cir. 1982). However, filing suit in a Federal District Court to test the constitutionality of the CDA is substantially different from having an Article III option for the merits of the litigation as in Commodity. Accordingly, we conclude that Appellant has not waived its constitutional challenge by appealing the CO's decision here and raising the constitutional question in this context.

The Separation Of Powers Issue

In Northern Pipeline Const., supra, a plurality of the Supreme Court concluded that Congress could not assign the resolution of a state-based dispute between private parties to the newly created class of bankruptcy judges who

were not given the protection of Article III. The controversy before the Court involved "private-rights" as opposed to "public-rights." Subsequently in Thomas v. Union Carbide Agric. Products, supra, and Commodity, supra, the Court upheld the right of Congress to enact legislation regulating the conduct of private individuals, including the resolution of monetary claims between such private individuals by non-Article III tribunals, where the rights arose from a Federally regulated (as opposed to state regulated) area. In Northern Pipeline, even the plurality which held that portions of the bankruptcy statutes were unconstitutional acknowledged that public-rights could properly be adjudicated by non-Article III legislative courts and administrative agencies. Regarding the so-called public-rights doctrine the Court stated:

> The "public rights" doctrine was first set froth in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856):

"[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at a common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Id, at 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See id, at 283-285; see also Ex parte Bakelite Corp., 279 U.S. 438, 452 (1929). But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Government and persons subject to

its authority in connection with the performance of the constitutional functions of the executive or legislative departments," Crowell v. Benson, 285 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see Ex parte Bakelite Corp., supra. at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. Crowell v. Benson, supra, at 50.

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently ... judicial." Ex parte Bakelite Corp., supra, at 458. See Murray's Lessee v. Hoboken Land & Improvement Co., 18 How., at 280-282. For example, the Court in Murray's Lessee looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in courts. Ibid. Concluding that

the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the government from one of its customs agents. On the same premise, the Court in Ex parte Bakelite Corp., supra, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> "The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. ... The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." 279 U.S., at 458 (emphasis added).

As emphasized by the Supreme Court above in the area of Federal contracts, the Federal Government may attach conditions to its consent to be sued. Further, disputes under Federal contracts do not necessarily even require judicial determination. Such disputes

may be committed exclusively to the jurisdiction of executive officers. United States v. Corliss Steam-Engine Company, 91 U.S. 321 (1875).

The Supreme Court has recognized that disputes arising under Government contracts could be finally resolved by the head of the agency that entered into the contract. The finality of such decisions extended to both questions of law and fact and there was no appeal therefrom. United States v. Wunderlich, 342 U.S. 98 (1951); United States v. Moorman, 338 U.S. 457 (1950). Therefore, dispute resolution under a Government contract need not be vested in any court, let alone an Article III court, contrary to Appellant's position. Even after enactment of the Wunderlich Act, 41 USC 321, 322, board decisions on questions of fact were accorded finality so long as they were based upon the administrative record and supported by substantial evidence. United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966); United States v. Bianchi, 373

U.S. 709 (1963). Under Wunderlich, there was no direct appeal to the Article III Court of Claims on any matter within the purview of a remedy granting clause in the contract. The Government, by virtue of drafting various remedy granting clauses, or an all disputes clause, could define virtually any claim as a dispute over which the board had jurisdiction, thereby depriving a contractor of any Article III, Court of Claims, direct access. United States v. Utah Constr., supra. Indeed, it was only between the effective date of the CDA and the FCIA, a period of about 42 months, that contractors were assured direct access to the Article III Court of Claims.

Under the CDA as well as the pre-CDA procedures, it was irrelevant that the appeal involved a claim by or against the Government. The prescribed procedure requires, and has always required, the contractor to appeal the adverse CO's decision, irrespective of whose claim it was. We see no difference in constitutional effect resulting from

a Government claim as opposed to a contractor claim so long as the claim arose under the contract. There is no difference in constitutional effect where the Government refuses to pay for additional work it directed the contractor to perform (a contractor claim), and where the Government seeks a reduction in the contract value, or the return of an overpayment, where the work scope was reduced (a Government claim). We conclude that the FCIA amendment of the CDA is therefore constitutional, notwithstanding the fact that the effect of such amendment was to require adjudication of Government claims against the contractor by non-Article III tribunals.

The Right To Jury Trial Issue

Appellant never seriously developed this Seventh Amendment challenge to the constitutionality of the CDA as amended by the FCIA. Jury trials have never been statutorily prescribed for Government contract disputes and indeed, the entire thrust of the Seventh

Amendment is for suits at common law. The right to sue the sovereign was not a common law right. Further, the public-rights doctrine applies to Seventh Amendment rights, the same as it does to Article III rights, Crowell v. Benson, 285 U.S. 22 (1932); Curtis v. Loether, 415 U.S. 189 (1974); Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commissioner, 430 U.S. 442, 450 (1977). Cf., Tull v. United States, 55 USLW 4571 (April 28, 1987). We conclude that Appellant is not entitled to a jury trial under the Seventh Amendment. We further conclude that the CDA as amended by the FCIA is constitutional.

FINDINGS OF FACT

Background

1. Prior to the award of the contracts here in issue the Forest Service had awarded two sales known respectively as the Bonk sale and the East Flat Creek II sale to the Robert Dollar Company. The Robert Dollar Company failed to harvest the timber on the two sales by their July 1981

expiration dates, and the two contracts were scheduled for resale in the spring of 1982. The resale contracts, known as the Bonk #2 and East Flat Creek III sales, were awarded to Appellant April 21, 1982. Prior to the awards to Appellant in April 1982, Appellant had purchased the physical assets of the Robert Dollar Company. As a condition of purchase Appellant had agreed to indemnify the Robert Dollar Company for any losses under the Bonk and East Flat Creek II sales. On the Bonk sale, the Robert Dollar Company had bid $511 per mbf on the major species, Douglas Fir, and Appellant had bid $542. On the East Flat Creek sales, the bids were $516 and $551, respectively. Accordingly, the Contracting Officer (CO) concluded that the Robert Dollar Company owed no damages as a result of its failure to cut timber under the two contracts. Appellant's bids were significantly in excess of the other bids and the Forest Service advertised rates (TR 18-21; AF section 5,

tabs 2 and 4, section 2, page 3; Exhibit G).

The Labor Dispute Issue

2. Appellant's position is that it experienced a labor dispute which should have entitled it to an adjustment in the contract term and that the Forest Service wrongfully refused to adjust the contract term. The applicable contract provision is set forth below. The period of the contracts was from April 21, 1982, through November 30, 1983. The "normal operating season" set forth in section A20 of the contracts was "6/1 to 10/31, inclusive."

> B8.21 Contract Term Adjustment. "Contract Term Adjustment" means adjustment only as provided immediately above and for the three circumstances described in this subsection. Under said circumstances, the contract term shall be adjusted in writing to include additional calendar days in one or more Normal Operating Seasons equal to the actual time lost, except as limited by (b) below.
>
> To qualify for such adjustment, Purchaser shall give written notice of the lost time not later than 30

calendar days after end of Normal Operating Season in which time was lost and at least 10 calendar days before Termination Date. Forest Service shall make prompt written acknowledgment of such notice indicating its concurrence with the number of days in the notice or the number of days Forest Service considers as qualifying for the adjustment. Lost portions of days shall be disregarded in computing time lost. The three circumstances qualifying for a Contract Term Adjustment are:

(a) Purchaser experiences delay in starting scheduled operations or interruption in active operations either of which stops removal of Included Timber from Sale Area through curtailment in felling and buckling, yarding, skidding and loading, hauling or road construction, as scheduled under B6.31, for 10 or more consecutive calendar days during a Normal Operating Season due to causes beyond Purchaser's control, including but not limited to acts of God, acts of the public enemy, acts of Government, labor disputes, fires, insurrections or floods.

(b) Causes described in (a) substantially affect the disposition or processing of Included Timber during Normal Operating Season through their effects on primary

timber processing facilities, with a resulting delay of 60 calendar days or more in use of such facilities. In such event, Contract Term Adjustment shall not extend for more than 12 consecutive months.

* * * *

The contract in Clause B8.23, Contract Term Extension, provided that a "term extension" as opposed to a "term adjustment" was any extension in the period of the contract which was granted outside the authority of Clause B8.21. Clause B8.23 provided that the Forest Service was not obligated to make term extensions.

3. The timber sale bid auctions on the East Flat Creek III sale and the Bonk sale occurred March 19, 1982, and February 26, 1982, respectively. Prior to the bidding, Appellant was involved in negotiations with two of its labor unions at separate processing mills, one at Glendale, Oregon, and another at a veneer plant in Klamath Falls, Oregon. Appellant was seeking a 20 percent wage reduction for a period of 90 days because

of poor business conditions in the northwest wood products industry (Tr. 78-79; Ex. 12, 16, 18). These negotiations resulted in the Klamath Falls and Glendale plywood workers agreeing to the reduction. The union representing the Glendale veneer and sawmill workers refused to agree to the proposed reductions and these operations were shut down by Appellant starting March 5, 1982, until approximately the first of June 1982 (Tr. 83, 92-93; Ex. 14, 15, 17-20, 22). Since the plywood operations at Glendale did not receive raw logs, the shutdown of the Glendale operation meant a loss of processing capacity of 1,800,000 board feet of timber per month (1,800 mbf) (Tr. 63, 368-369).

4. Clause B6.31, referred to in Clause B8.21(a) above, provides that the purchaser shall provide in writing an annual schedule of anticipated major activities such as logging, road maintenance, scaling, etc., for the particular sale. A separate plan of operations was also required within 60

days of award under Clause C6.3 above. No specific plans were filed for the sales here in issue (Tr. 323-324). A general plan of operations covering only the logging operations on 16 of Appellant's contracts was prepared during the summer of 1982 and indicated that logging on the present sales was not planned until July 1983 (Ex. 11). A specific plan for these particular sales covering logging, slash disposal, erosion control and road maintenance was submitted by Appellant February 11, 1983. This plan indicated that logging on the two sales would not commence until September 1, 1983.

5. On page 8 of its reply brief, we note that Appellant stated:

> . . . While deficits in processing, resulting from the labor problems, could be made up by increasing production at the mill by adding evening and night shifts, harvesting schedules are not so easily recovered. . . .

6. By letters dated October 6, 1983 (Ex. 1, 4), Appellant requested that the sales be extended or adjusted. As

justification therefor Appellant relied on Clause B8.21(b) and the labor negotiations, as well as Appellant's harvesting of distressed timber under the North Area Salvage and Locket sales. By letters dated October 12, 1983, the CO denied Appellant's requests. The Forest Service subsequently resold the timber and by letters dated May 2, 1984, assessed Appellant damages therefor as set forth below:

* * * *

1. You were awarded the East Flat Creek III Timber Sale on April 21, 1982, in response to your high bid of $1,207,905.47 on March 19, 1982.

2. The contract terminated on November 30, 1983. None of the Included Timber had been cut or removed.

3. The sale was resold on April 10, 1984, under the original contract terms and conditions.

4. Damages were determined and assessed pursuant to B9.4 Failure to Cut:

a. Current Contract Value	$1,207,905.47
b. Plus cost of resale	148.73
c. Less effective Purchaser Credit	0.00
d. Less resale value	469,175.64
Total damages	$ 738,878.56
Unobligated cash in Timber Sale Account	0.00
Balance due	$ 738,878.56

* * * *

1. You were awarded the Bonk #2 Timber Sale on April 21, 1982, in response to your high bid of $861,568.84 on February 26, 1982.

2. The contract terminated on November 30, 1983. None of the Included Timber had been cut or removed.

3. The sale was resold on April 10, 1984, under the original contract terms and conditions.

4. Damages were determined and assessed pursuant to B9.4 Failure to Cut:

a. Current Contract Value	$861,568.84
b. Plus cost of resale	155.61
c. Less effective Purchaser Credit	0.00
d. Less resale value	250,249.12
Total damages	$611,475.33
Unobligated cash in Timber Sale Account	0.00
Balance due	$611,475.33

The record indicates that both resales were accomplished by the Forest Service through competitive bidding. Appellant filed timely appeals.

The Salvage Sale Issue

7. On October 26, 1981, Appellant was awarded the North Area Salvage sale by the Forest Service. The sale prospectus indicated that an estimated volume of 1,620 mbf existed. The scheduled completion date was November 30, 1983, the same as the East Flat Creek III and Bonk #2 sales (Tr. 116; Ex. 25, 26, 28). During 1982 Appellant harvested 1,380 mbf of the estimated 1,620 mbf (Tr. 124, 136-137; Ex. 41). Prior to Appellant's resuming logging in 1983, the Forest Service discovered that a substantial timber volume had been blown down during the winter. The Forest Service estimated that 940 mbf had blown down and categorized the occurrence as "catastrophic" (Tr. 124-129; 137; ex. 29-31).

8. Under Clause B8.22 of the contract, a catastrophic occurrence will

result in modification or termination of the contract. However, in lieu of terminating the sale and readvertising for resale, the parties here agreed that Appellant would log the sale with the additional blowdown and that the contract would be extended for one year to November 30, 1984 (Tr. 128-132; Ex. 31, 33). A total of 3,700 mbf was logged from the sale and it was again extended to September 1985 (Tr. 132-137).

9. Testimony from Appellant's sale representative indicated that the extra amounts harvested under the North Area Salvage sale resulted in Appellant's putting off the harvesting of the sales here in issue (Tr. 142). However, other evidence sheds considerable doubt on this reason as the cause of Appellant's delay in harvesting the East Flat and Bonk sales. For example, Appellant planned to harvest 29,804 mbf of timber from 16 sales it had with the Forest Service during the September 1982-August 1983 time frame (Tr. 38-39; Ex. 11). Appellant needed 39,644 mbf for

processing at its Glendale mill. Appellant intended to make up for the deficiency in logs made available for harvest by purchasing the balance of approximately 10,000 logs (Ex. 46, see page 8 of reply brief). The Glendale facility actually processed 54,385 mbf during the September 1982-August 1983 time frame, far in excess of the amount originally forecast and far more than can be accounted for by the overrun in volume from the North Area Salvage sale of only 2,100 mbf. Appellant on page 8 of its reply brief states:

> . . . Thus, simply because GTR's processing at the mill, in hindsight exceeded earlier forecasts, does not mean its harvesting capabilities were any greater. It also doesn't alter the fact that performance of the Bonk and East Flat sales was delayed because that particular logging crew was tied up harvesting an additional 2,100 mbf on the North Area Salvage sale.

Appellant cites no evidence to support this position and we find none in the record. Nor is there evidence of a shortage of contract loggers.

10. Appellant cites the Locket sale as another cause of its need to delay the harvest under its East Flat and Bonk sales. The Locket sale occurred after a fire in the Locket sale area. While Appellant's letters of October 6, 1983, requesting contract extensions on the East Flat and Bonk sales, recited that logging operations were in progress on the Locket sale, Appellant's operations manager testified that the Locket sale was harvested only in 1984 and 1985 (Tr. 144-145; Ex. J).

11. Testimony from Appellant's personnel indicated that the East Flat and Bonk sales could have been logged during the term of the contracts but that it may not have been economical to do so (Tr. 112, 143). The sales here in issue included timber at the highest prices bid by Appellant for the Douglas Fir species. Neither these sales nor the three sales

bid at higher prices were logged by Appellant (Ex. 11, Complaint, Ex. A thereto).

The Term of The Resales Issue

12. The term of Appellant's contracts extended from April 21, 1982 through November 30, 1983. Since the normal operating season on these contracts was from June 1 through October 31, two logging seasons were available. The East Flat Creek resale contract was awarded April 24, 1984, and included a termination date of November 30, 1985, thereby permitting two logging seasons, the same as Appellant's contract. However, the Bonk resale contract was awarded April 27, 1984, and included a termination date of November 30, 1984, thereby permitting only one logging season in lieu of the two seasons permitted under Appellant's contract. The reduction in contract term on the Bonk II resale apparently resulted from an error in that the Forest Service intended to resell utilizing the original contract term (Tr. 215). Appellant's

position is that the Government has failed to mitigate damages or provide evidence from which a proper measure of damages could be determined.

13. On the East Flat Creek III sale, the minimum acceptable bid for Douglas Fir was $52.43 per mbf and Appellant bid $551.00. On the resale the minimum acceptable bid was $59.77 per mbf on Douglas Fir and the resale contractor bid $204.05.

14. On the Bonk #2 sale the minimum acceptable bid was $17.37 per mbf Douglas Fir and Appellant $524.63. On the resale the minimum acceptable bid ws $25.98 and the resale contractor bid $155.00.

15. On the East Flat Creek resale which had the same term as Appellant's sale, the resale contractor bid 341 percent higher than the minimum acceptable bid and 37 percent of Appellant's bid. On the Bonk resale, which had a shorter term than on Appellant's sale, the resale contractor bid 597 percent higher than the minimum acceptable bid and 29 percent of

Appellant's bid. Appellant presented an expert witness who performed a regression analysis which was corroborated with empirical data which indicated that the effect of the reduced term of the resale was $13.10 per mbf (Tr. 283-284).

16. The East Flat Creek sale was logged in one season notwithstanding the fact that it had a two season term (Tr. 356-357). The greatest effect on the bid prices in a timber sale is the need for the timber by a particular purchaser (Tr. 273-274, 347-348). Witnesses testifying on behalf of the Forest Service stated that the difference in term had no effect on the bid prices but conceded that sales with two-year terms had higher prices than sales with only a one-year term (Tr. 327-367).

DISCUSSION

The evidence clearly shows that Appellant failed to cut and remove timber by the contract expiration date on the two sales here in issue; that the Forest resold the timber using competitive bid procedures; that the timber was resold

for less than the values under the present contracts; that damages were calculated in accordance with Clause B9.4 of the contract, Failure to Cut; that such damages were $611,475.33 and $738,878.66, respectively; and that the term of the Bonk Timber sale contract resale was shorter than the term of the basic contract. In excuse of the failure to cut, Appellant alleges that it should have been granted contract term adjustments or extensions because of labor disputes and because Appellant agreed to cut so-called "distressed" timber on other sales it had with the Forest Service. In addition to the avoidance of damages because of the difference in the term of the resale contract, Appellant alleges that the Government is not entitled to interest on the amounts it has assessed.

The Labor Dispute Issue

Under Clause B8.21 Appellant is entitled to an adjustment in the contract term equal to the actual time lost during the normal operating season for the

specified reasons (FF 2). The clause provides three circumstances which entitle a purchaser to a contract adjustment. Appellant is not entitled to an extension under B8.21(a) because there was no delay in start up of the scheduled operations, or interruption in active operations, which stopped removal of Included Timber for 10 or more consecutive days due to causes beyond Appellant's control such as a labor dispute. Here, there were no scheduled operations or active operations. There is no demonstrated delay of 10 or more consecutive days. The delay, if any, occurred during the March 5th through May time frame and not during the normal operating season which began June 1 (FF 2, 3).

Most significantly under the terms of B8.21(a), the cause of delay, such as the labor dispute, must be beyond Appellant's control. Here, the labor dispute was not beyond Appellant's control. Indeed, Appellant requested the wage concessions from the workers and

when agreement could not be reached regarding such wage concessions, Appellant shut down the plant. Under these circumstances notwithstanding the fact that the record does not reflect that these actions were at all illegal or improper, we are nevertheless constrained to conclude that they were well within Appellant's control.

Paragraph B8.21(b) incorporates the same causes as paragraph B8.21(a). Accordingly, Appellant may not recover under B8.21(b) because the labor dispute was not beyond Appellant's control, and because the delay did not occur during the normal operating season. The evidence also indicates that Appellant was well aware of the possibility of a shut down prior to bidding on the sales and certainly before the award of contracts (FF 2), and Appellant appears to concede that deficits in processing caused by labor problems can be remedied by adding shifts (FF 5).

The Salvage Sale Issue

Appellant essentially contends that because it agreed to remove additional quantities of timber on two other sales it had with the Forest Service, the North Salvage and Locket sales, it should be relieved of its obligation to timely perform the two contracts here in issue. However, at the time Appellant agreed to log the other sales, there is no evidence that it even proposed, let alone that the Forest Service agreed, to an extension of the present two sales. Indeed, on the North Salvage sale, Appellant was entitled to a termination because of the timber blowdown was categorized by the Forest Service as a catastrophe. Therefore, Appellant could have simply refused to log the additional volume (FF 8-10). The Locket sale also relied upon by Appellant was logged in 1984 and 1985 and, therefore, was not a factor justifying the delay in logging the present sales which were awarded in 1982 and expired in 1983 (FF 10). The record indicates that

Appellant processed considerable more timber than anticipated during the time frame of the present sales (FF 9) and the evidence suggest that the present sales did not contribute to the extra volume processed because Appellant would have had to pay higher prices for such timber than from other sales entered into by Appellant (FF 11).

In conclusion, while the parties could have agreed to extend the present contracts because of a more urgent need to log other timber, the parties did not agree and we, therefore, conclude that such logging does not provide a legal justification to extend the present sales. Most significantly, the evidence is simply not persuasive that either the labor dispute or the Appellant's logging of distressed timber was the proximate cause of Appellant's failure to log the sales here in issue, see e.g., FF 1, 11.

The Contract Extension Issue

Contract Clause B8.23 defines a contract term extension as an extension

in the term of the contract requested by the purchaser other than a contract term adjustment made in accordance with Clause B8.21. Clause B8.23 provides that the Forest Service is not obligated to grant extensions, as opposed to adjustments. Appellant, recognizing that contract Clause C8.231, Conditions for Contract Term Extension, requires that 75 percent of the estimated volume be cut and removed as a condition for an extension, nevertheless alleges that the CO had authority to grant an extension, citing 36 CFR § 223.115 (fn 5, page 10 of Appellant's brief). Title 36 CFR § 223.115 provides that an extension may be granted when it serves the public interest. The section of the Code is derived from 16 USC 472(a)(c) which provides that extensions may be granted only when a purchaser has diligently performed, or when the substantial overriding public interest justifies the extension. Here, purchaser did not perform at all and there is no basis in the record upon which to

conclude that a substantial overriding public interest justifies an extension here. Indeed, the existence of the contract Clauses B8.23 and C8.231 and the requirements therein, including the need for 75 percent performance by Appellant are controlling.

The Damages Issue

One of the sales here in issue, the Bonk #2 sale had a contract term of from April 21, 1982 through November 30, 1983. Since the normal operating season in the location of the sale was from June 1 to October 31, the sale spanned two operating seasons. After Appellant's failure to cut, the Forest Service resold the timber, and apparently because of inadvertence on the part of the Forest Service, the resale contract spanned only one operating season, since the contract term was from April 27, 1984 to November 30, 1984. Clause B9.4, Failure to Cut, provides for the use of the resale bid in the calculation of damages without regard to whether the sale was performed as in a procurement contract. G & W Logging,

AGBCA No. 83-264, 83-2 BCA ¶ 16,878, citing Siller Brothers, Inc. v. United States, 655 F.2d 1039 (Ct. Cl. 1981).

Appellant's regression analysis indicated that the difference in value between a 21-month sale such as Bonk #2, and a 7-month sale such as the resale (Bonk III) was $13 per mbf. The difference in value between a one season sale and two season sale in 1984 based upon Exhibit 38 was $9 per mbf. We conclude based upon the evidence that the Forest Service's calculation of damages was too high because the Bonk resale was accomplished under a shorter term than Appellant's Bonk #2 sale. Contrary to Appellant's position, however, we do not agree that the error by the Forest Service obviates any damages being assessed against Appellant. However, the Forest Service assessment of damages should be reduced $11 per mbf, the average of the $13 and $9 per mbf figures stated above. Since the Bonk sales included an estimated quantity of 1,910 mbf, the amount of the damage assessment

should be reduced by $21,010 (1,910 mbf times $11 per mbf).

We also conclude, contrary to Appellant's position that the Forest Service is entitled to interest on the amount of its claim. John T. Penrod, AGBCA No. 79-169-4, 80-2 BCA ¶ 14,789.

DECISION

Appeal No. 84-319-1 is sustained in the amount of $21,000. The balance of Appeal No. 84-319-1 and all of Appeal No. 84-320-1 are denied.

EDWARD HOURY
Administrative Judge

Concurring:

MARILYNN M. EATON
Administrative Judge

ROBERT M. M. SETO
Administrative Judge

Issued at Washington, D.C.,
August 26, 1987.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:
August 29, 1988

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a form for that purpose with this notice. Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

FRANCIS X. GINDHART
Clerk

APPENDIX D

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1598

GREGORY TIMBER RESOURCES, INC.,

Appellant,

v.

UNITED STATES,

Appellee.

Before FRIEDMAN, BISSELL and MAYER, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case, and a reponse thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

Judge Bissell would grant the petition.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Francis X. Gindhart
Clerk

November 30, 1988

cc: Charles F. Adams
Paul J. Ehlenbach

APPENDIX E

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1598

GREGORY TIMBER RESOURCES, INC.,

Appellant,

v.

UNITED STATES,

Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same is declined.

FOR THE COURT

Francis X. Gindhart
Clerk

December 16, 1988

cc: Charles F. Adams
Paul J. Ehlenbach

APPENDIX F

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
October 12, 1983

Bonk #2, #065062, 4/21/82

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

This is in response to your letter of October 6, 1983, in which you requested either a contract term adjustment or a contract term extension for at least one year.

- You requested contract term adjustment under B8.21(b), for a delay of 60 calendar days or more during the Normal Operating Season, while your primary timber processing plants were closed and labor negotiations were in process.

This contract does not provide for market-related contract term adjustment, which seems to be the basis of your request. Labor negotiations to

obtain wage concessions do not constitute a labor dispute under B8.21(b), since your plants were apparently closed due to market conditions rather than a strike by your employees.

- Also, you requested early extension or contract term adjustment for operating distressed timber in more urgent need of harvesting.

Such a request may be honored only when the Forest Service intent to grant extensions or adjustments on other contracts is spelled out in the prospectus for the timber in need of urgent harvesting. This was not the case on either of the two sales mentioned in your letter.

- Finally, this sale does not qualify for any waiver of the diligent performance requirements for contract term extension; all of which apply to sales sold prior to January 1, 1982.

For the foregoing reasons, I have no authority to adjust or extend the November 30, 1983, termination date of this timber sale contract.

CHARLES R. GRAHAM
Contracting Officer

cc: Prospect
Nicholas
Killingsworth
R6-TM

APPENDIX G

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
October 12, 1983

East Flat Creek III, #065179, 4/21/82

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

This is in response to your letter of October 6, 1983, in which you requested either a contract term adjustment or a contract term extension for at least one year.

You requested contract term adjustment under B8.21(b), for a delay of 60 calendar days or more during the Normal Operating Season, while your primary timber processing plants were closed and labor negotiations were in process.

This contract does not provide for market-related contract term

adjustment, which seems to be the basis of your request. Labor negotiations to obtain wage concessions do not constitute a labor dispute under B8.21(b), since your plants were apparently closed due to market conditions rather than a strike by your employees.

- Also, you requested early extension or contract term adjustment for operating distressed timber in more urgent need of harvesting.

Such a request may be honored only when the Forest Service intent to grant extensions or adjustments on other contracts is spelled out in the prospectus for the timber in need of urgent harvesting. This was not the case on either of the two sales mentioned in your letter.

- Finally, this sale does not qualify for any waiver of the diligent performance requirements for contract term extension; all of which apply to sales sold prior to January 1, 1982.

For the foregoing reasons, I have no authority to adjust or extend the November 30, 1983, termination date of this timber sale contract.

JOHN G. LINDNER
Contracting Officer

cc: Prospect
Nicholas
Killingsworth
R6-TM

APPENDIX H

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
December 22, 1983

Bonk #2, #065062, 4/21/82

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

This is in response to your letter of November 28, 1983.

This sale did not qualify for contract term adjustment or contract term extension for the reasons stated in my letter of October 12, 1983, and terminated in default on November 30, 1983.

Accordingly, I intend to resell the remaining Included Timber and make a

determination of damages pursuant to B9.4 Failure to Cut.

CHARLES R. GRAHAM
Contracting Officer

cc: Prospect
Nicholas
Killingsworth
R6-TM

APPENDIX I

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
December 22, 1983

East Flat Creek III, #065179, 4/21/82

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

This is in response to your letter of November 28, 1983.

This sale did not qualify for contract term adjustment or contract term extension for the reasons stated in my letter of October 12, 1983, and terminated in default on November 30, 1983.

Accordingly, I intend to resell the remaining Included Timber and make a

determination of damages pursuant to B9.4 Failure to Cut.

JOHN G. LINDNER
Contracting Officer

cc: Prospect
Nicholas
Killingsworth
R6-TM

APPENDIX J

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
May 2, 1984

Bonk #2, #065062

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

On April 12, 1984, you were sent a Bill for Collection for the balance due, $611,475.33, for damages pursuant to B9.4 Failure to Cut. Payment has not been received. Accordingly, I have considered your failure to respond to our damage assessment under the Contract Disputes Act of 1978.

Location: Region 6, Rogue River National Forest, Prospect Ranger District

Sale: Gregory Timber Resources, Inc., Bonk #2, #065062; 2400-6 (9/73)

Findings

1. You were awarded the Bonk #2 Timber Sale on April 21, 1982, in response to your high bid of $861,568.84 on February 26, 1982.

2. The contract terminated on November 30, 1983. None of the Included Timber had been cut or removed.

3. The sale was resold on April 10, 1984, under the original contract terms and conditions.

4. Damages were determined and assessed pursuant to B9.4 Failure to Cut:

a.	Current Contract Value	$861,568.84
b.	Plus cost of resale	155.61
c.	Less effective Purchaser Credit	0.00
d.	Less resale value	250,249.12
Total damages		$611,475.33
Unobligated cash in Timber Sale Account		0.00
Balance due		$611,475.33

5. You were properly billed for the balance due, $611,475.33, on April 12, 1984, and have failed to respond or make payment.

Decision

It is my decision that the determination of damages in our letter of April 12, 1984, is correct and in accord with B9.4 Failure to Cut. Therefore, Gregory Timber Resources, Inc., is liable to the United States for the sum of $611,475.33, plus interest from the due date of April 27, 1984.

It is also my decision to make demand on the United Pacific Insurance Company, Bond No. U 446425, for payment of damages up to the penal sum of the performance bond in the amount of $87,000.00.

This is the final decision of the Contracting Officer. This decision may be appealed to the Agriculture Board of Contract Appeals. If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof, to the Agriculture Board of Contract Appeals, within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is

taken. The notice shall indicate that an appeal is intended, should reference this decision and identify the contract by number. In lieu of appealing to the Agriculture Board of Contract Appeals, you may bring an action directly in the U.S. Court of Claims, within 12 months of the date you receive this decision.

CHARLES R. GRAHAM
Contracting Officer

cc: United Pacific Insurance
Company, Bond No. U 446425

Prospect
Nicholas
6750
R6-TM

APPENDIX K

ROGUE RIVER NATIONAL FOREST
P. O. Box 520, Medford, Oregon 97501

2450 Sale Contracts & Permits
May 2, 1984

East Flat Creek III, 065179

Gregory Timber Resources, Inc.
P. O. Box C
Glendale, OR 97442

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

On April 12, 1984, you were sent a Bill for Collection for the balance due, $738,878.56, for damages pursuant to B9.4 Failure to Cut. Payment has not been received. Accordingly, I have considered your failure to respond to our damage assessment under the Contract Disputes Act of 1978.

Location: Region 6, Rogue River National Forest, Prospect Ranger District

Sale: Gregory Timber Resources, Inc., 4/21/82; East Flat Creek III, #065179; 2400-6 (9/73)

Findings

1. You were awarded the East Flat Creek III Timber Sale on April 21, 1982, in response to your high bid of $1,207,905.47 on March 19, 1982.

2. The contract terminated on November 30, 1983. None of the Included Timber had been cut or removed.

3. The sale was resold on April 10, 1984, under the original contract terms and conditions.

4. Damages were determined and assessed pursuant to B9.4 Failure to Cut:

a.	Current Contract Value	$1,207,905.47
b.	Plus cost of resale	148.73
c.	Less effective Purchaser Credit	0.00
d.	Less resale value	469,175.64
Total damages		$ 738,878.56
Unobligated cash in Timber Sale Account		0.00
Balance due		$ 738,878.56

5. You were properly billed for the balance due, $738,878.56, on April 12, 1984, and have failed to respond or make payment.

Decision

It is my decision that the determination of damages in our letter of April 12, 1984, is correct and in accord with B9.4 Failure to Cut. Therefore, Gregory Timber Resources, Inc., is liable to the United States for the sum of $738,878.56, plus interest from the due date of April 27, 1984.

It is also my decision to make demand on the United Pacific Insurance Company, Bond No. U 446424, for payment of damages up to the penal sum of the performance bond in the amount of $121,000.00.

This is the final decision of the Contracting Officer. This decision may be appealed to the Agriculture Board of Contract Appeals. If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof, to the Agriculture Board of Contract Appeals, within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is

taken. The notice shall indicate that an appeal is intended, should reference this decision and identify the contract by number. In lieu of appealing to the Agriculture Board of Contract Appeals, you may bring an action directly in the U.S. Court of Claims, within 12 months of the date you receive this decision.

JOHN G. LINDNER
Contracting Officer

cc: United Pacific Insurance Company,
Bond No. U 446424

Prospect
Nicholas
6750
R6-TM

APPENDIX L

Excerpts from Testimony of Contracting Officers Graham and Lindner

Q Then referring back to Exhibit 1, Mr. Gregory, Gregory Timber Resources requested an adjustment due to volume needs being filled by distressed timber and refers to a North Area Salvage and Locket II sales. Did you do any investigation to determine the circumstances of either of those sales?

A No, other than the fact they are not Forest Service sales in the Rogue River Forest, to my knowledge.

Q And then in response you state that, "Such a request may be honored only when the Forest Service's intent to grant extensions or adjustments on other contracts is spelled out in the prospectus for the timber in need of urgent harvesting." Was that the basis of your decision to deny the request for an extension or adjustment due to those distressed timber sales?

A Yes.

Q Do you recall whether you contacted the contracting officer or the Forest Service representative responsible for managing either of those two sales?

A Actually I don't recall what we did in that case, no.

MR. GARDNER: Line 13.

BY MR. GARDNER:

Q Was it your understanding, then, that you had no authority to adjust or extend the contract?

A Yes, that's my understanding.

Q Do you recall how long it took you to make the determination to reject the Gregory Timber Resource request for an extension or modification?

A No, I don't recall.

MR. GARDNER: Line 22.

BY MR. GARDNER:

Q Is it your experience in the Forest Service that they have -- that the Forest Service has never granted contract term extensions or adjustments on green sales based upon a contractor's agreement to perform a distressed salvage sale where an intention to grant such an

extension is not expressed in either of the contracts or the prospectus?

A I'm not sure I understand what you're saying.

Q Okay, I will repeat the question, then. Is it your understanding that the Forest Service has never granted contract term adjustments or extensions on green sales in order for the contractor to perform salvage or distressed sales unless such an intention has been expressed in the prospectus or in the contract, either the distressed sale or the green sale?

A You're encompassing a large area when you say my "understanding of Forest Service has never" because I don't know that.

Q I'm just asking for your understanding.

A No, from my experiences I don't know whether they have or haven.t.

Q Do you have an understanding as to whether or not you would have authority to grant such an extension or modification even though it wasn't in the

prospectus or in the contract documents based upon a contractor's agreement to perform a salvage or distress sale?

A I'm not sure I understand what you're asking.

Q I will repeat the question. Is it your understanding that you would have the authority to grant an extension or modification or adjustment to a green sale where the contractor agreed to perform a distress even though there was no intention to grant such an extension expressly stated in the prospectus or the documents of either contract?

A No, I don't have that authority. I administer the contract, period.

[Testimony of Charles Graham; Fed Cir App 0196-0199]

* * * * *

Q [Government Attorney Arno Reifenberg] Could you let me have that copy of the manual that I gave you earlier I dug up? Let's see, this is a copy of the Forest Service Manual 2433.12 at Contract Term Extensions. Apparently

it came out in May of 1983, and here under item F is a discussion of early extensions, and I think in your letter to the company, Exhibit 5, you said, "This kind of a request can be granted only if it's spelled out in the prospectus for the timber in need of urgent harvesting", and I assume -- I may not assume, but as you read this F that I referred to, particularly on the top of this page eight, the last sentence from the top paragraph, is that the one you had in mind?

A [Contracting Officer Lindner] Yes.

Q Now, I would like to get to a point Mr. Gardner was trying to make; this sentence says that "such extensions should" -- underline the word "should" -- "be granted only when that's stated in the prospectus." Now, that's the usual Forest Service language, but what Mr. Gardner I think was trying to get at, is this a hard and fast rule, are you stuck by whatever the prospectus for the other contract says, or if you had a real

unusual occurrence, something happens, some big catastrophe happens all of a sudden, do you think you could go to this company and say, "Well, it's not in the prospectus but this happened all of a sudden. If you quit working on this contract I will give you an early extension." That's a hypothetical, but is this possible?

A Well, Arno, there is some other conditions that follow this.

Q I'm just focusing on this one sentence. And you told Mr. Gardner that has never happened to you, and maybe you can't answer my question, but I think his question is if something real unusual happens, a big blow-down on that one ongoing contract that you really -- for some reason you want that removed first, could you give that company an early extension on some other contract?

A Oh, yes. And I said that.

Q Even without the prospectus spelling it out?

A Yes, but I said it had to do with his word catastrophe and had to do

with -- what I'm trying to point here is restrictions, and they talk here about substantial timber quantities or values are involved. And so someone has to determine what substantial means, or what catastrophe means. And I'm saying that in the case of the volumes involved here, they were not considered substantial so that when we got back to the word "should", that was almost a "shall not be" under those conditions.

MR. GARDNER: Page 62, question by Mr. Gardner. Line 12.

BY MR. GARDNER:

Q Mr. Reifenberg asked you on this issue of extensions for distressed timber catastrophe on another sale and you said the definition of substantial quantities of timber was relative. Is that correct, just depends on the circumstances of the sale?

A That's right.

Q So that a million feet on a ten million sale may not be substantial, but a million feet on a one million sale may be substantial?

A It could be, yes.

Q That's what you meant by that?

A That's what I meant.

[Testimony of John Lindner;
Fed Cir Appdx 0236-0239]

* * * * *

MR. GARDNER: The Timber Sale Inspection Report is 29, the March 3rd letter is 30.

MR. REIFENBERG: Okay.

BY MR. GARDNER:

Q Would you just describe for the Court what that document is and what discussions you had with the Forest Service concerning it?

A Basically we were meeting on the sale area, a Forest Service representative and myself, to determine that yes, in fact, a volume of additional timber had blown down and I was told the Forest Service crews were in the process of cruising the timber and that I was telling them that I was wanting to start operations as quickly as possible on this sale.

Q Did you initiate this contact concerning the additional blow-down or did it come from the Forest Service?

A No, it came from the Forest Service. The sale administrator called me at my office.

Q Did they request that you agree to log this additional volume of blow-down?

A They did at that time, yes.

Q And if you know, were those handwritten notes on Exhibit 29 written by anyone from Gregory Timber Resources, Inc.?

A No; absolutely not.

Q Do you know from your meeting who it was that made those entries?

A Yes, I do.

Q Who was it?

A It was Stan Moore, the sale administrator.

Q Now, it indicates in the handwritten notes that, "It appears that this sale has sustained catastrophic damage." Is that what the -- was it Mr. Moore?

A Yes.

Q Is that what he told you in your meeting with him on the 2nd?

A That's exactly what he said, yeah.

Q Could you tell the Court what you understood that to mean?

A Catastrophic damage was -- means it was too much volume that it just couldn't be removed as an incidental amount or it was damaged -- catastrophic was an act of God like a -- high winds, heavy snows, anything of that nature, severe weather conditions.

Q That caused additional timber to be in need of salvage?

A Yes, to be blown down.

Q And did you agree on behalf of Gregory Timber Resources, Inc. to harvest the additional volume?

A I did.

Q At that time had the Government given you any estimate of the additional volume?

A No.

MR. GARDNER: I would offer Exhibit 29.

MR. REIFENBERG: No objection.

JUDGE HOURY: Admitted.

[Appellant's Exhibit No. 29 for identification was received in evidence.]

BY MR. GARDNER:

Q Please refer to Exhibit 30, Mr. Wall, and can you identify that for the Court?

A That's the official letter from the contracting officer that stated that the sale had -- they felt it had gone -- qualified as damage by catastrophe under B2.133 and that they were in the process of cruising it and that we are agreeing to go ahead and take it out at reappraised rates.

Q What was the date of that letter?

A This is March 3rd, 1983.

Q Why was it necessary for there to be a rate redetermination?

A If catastrophe -- if the volume is equal to more than half of the

advertised volume or more than a million feet, they have to redetermine the rates, do a new rate study on it, and if it's less than that they don't have to. So that's just the rule.

Q At this time did the Government give an estimate of the additional volume; do you recall?

A Not at this time, no. It was sometime later when the cruise was completed.

Q Who was performing the cruise?

A The Forest Service.

Q And when you say cruise, what is that?

A They go out -- they go out and through acceptable volume determination methods determine the amount of timber that is per acre or in a stand of timber.

MR. GARDNER: I'd offer Exhibit 30.

MR. REIFENBERG: No objection.

JUDGE HOURY: Admitted.

[Appellant's Exhibit No. 30 for identification was received in evidence.]

BY MR. GARDNER :

Q Please identify Exhibit 31 for the court.

A This is my request for a one-year extension after they finished their cruise and I realized how much was there, we had agreed to take it out, but I needed more time.

Q At that time what was the Forest Service estimate of the additional volumed in need of harvesting?

A 940,000 board feet.

Q And that was an estimate prepared by the Forest Service?

A Yes, sir.

Q And you were relying on that?

A Yes.

Q And as a result of that estimate and the additional volume you requested a one-year extension on that contract?

A Yes, I did.

Q And was that granted?

A Yes, it was.

Q Now, at any time did you suggest to the Government that the sale

should be categorized as having sustained catastrophic damage or did that all come from the Forest Service?

A No, that came from the Forest Service.

Q And it was their idea that the sale should be so classified?

A That's -- yes, absolutely.

MR. GARDNER: I'd offer Exhibit 31.

MR. REIFENBERG: No objection.

JUDGE HOURY: Admitted.

[Appellant's Exhibit No. 31 for identification was received in evidence.]

[Testimony of Ted Wall; Fed Cir Appdx 0143-0147]

* * * * *

BY MR. GARDNER:

Q Did anyone from the Forest Service -- after the blow-down which occurred in March of '83, did any representatives of the Forest Service ever suggest that this was only minor damage?

A Never, no.

Q From the beginning they said they thought it was catastrophic damage?

A From the first phone call.

Q And there was never any question on that issue?

A No.

[Testimony of Ted Wall;
Fed Cir Appdx 0155]

APPENDIX M

The parent company is Gregory Affiliates, Inc. Its affiliates and subsidiaries are:

Gregory Forest Products, Inc.
Gregory Timber Resources, Inc.
Northwest Timber Affiliates, Inc.
G S Aviation, Inc.
Diamond Lake Timber Company, Inc.
Porcupine Lake Timber Company, Inc.
Rimrock Lake Timber Company, Inc.
Gregory Government Securities, Inc.
Gregory Investment and Management, Inc.
High Sierra Finance Company
GTR International, Inc.
GFP Foreign Sales, Inc.

Supreme Court, U.S.
FILED
MAY 4, 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1465

In the Supreme Court of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DOUGLAS LETTER
GREGORY C. SISK
PAUL DAVID LANGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an Article III forum for initial review of a government contracting officer's determination that petitioner had breached two contracts with the government.

2. Whether the court of appeals correctly upheld the factual findings of the Department of Agriculture Board of Contract Appeals that the reasons asserted by petitioner for its failure to perform on two timber contracts were not sufficient to mandate an extension of time to perform those contracts.

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United States v. *Rush*, 804 F.2d 645 (Fed. Cir. 1986)	7
United States v. *Wunderlich*, 342 U.S. 98 (1951)	7

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Miscellaneous:

3 W. Blackstone, *Commentaries on the Laws of England* (Philadelphia 1772) 7

1 F. Pollack & F. Maitland, *The History of English Law* (1st ed. 1895) 7

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1465

GREGORY TIMBER RESOURCES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 855 F.2d 841.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on August 29, 1988. A petition for rehearing was denied on November 30, 1988 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on February 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a logging company, was awarded two timber sale contracts requiring that it cut, remove, and pay

for specified timber on government lands (Pet. App. 2a-3a). Both contracts expired without petitioner's having begun performance (*id.* at 4a). The government resold the contracts to third parties for less than the original price (*id.* at 4a-5a). A contracting officer then assessed damages against petitioner for its default on the contracts; the officer measured damages by the difference between the contract price with petitioner and the resale price (*id.* at 5a).

2. Under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, as amended by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, a contractor may appeal a contracting officer's decision by either seeking review in the agency's board of contract appeals (41 U.S.C. 606) or by filing an action in the United States Claims Court (41 U.S.C. 609(a)(1)). Petitioner elected to appeal the contracting officer's decision to the Department of Agriculture Board of Contract Appeals (Board). Pet. App. 5a.

After a trial, the Board held that petitioner was not entitled to an Article III court to resolve initially its contract dispute with the government (Pet. App. 40a-47a). It also held that petitioner's failure to perform the contracts could not be excused on the ground that it should have been granted extensions of time or adjustments on the contracts (*id.* at 64a-70a). The Board found that petitioner was not entitled to the extensions as a matter of right or discretion under the applicable contract clauses and regulations that allow extensions when supported by a substantial overriding public interest, 36 C.F.R. 223.115 (Pet. App. 64a-70a).

3. The court of appeals affirmed (Pet. App. 1a-27a). The court first rejected petitioner's contention that a contractor's option of filing a case in the Claims Court is constitutionally inadequate because the Claims Court is not an Article III court. The court ruled that petitioner, hav-

ing chosen to appeal the contracting officer's decision to the Board, waived any objection to the nature of the alternative judicial forum (Pet. App. 8a-10a).

The court then rejected petitioner's contention that it should have been excused from performance of the contracts or given an extension of time for performance (Pet. App. 11a-17a). The court reached that conclusion on the basis of the Board's *de novo* findings that: (1) the reasons offered by petitioner for its failure to complete the contracts were unsupported by the facts, and (2) the true cause for the default was petitioner's economic decision to avoid paying the relatively high price of timber under those contracts (*ibid.*).

The court of appeals also rejected petitioner's claim that the contracting officers had erred by refusing to acknowledge that they had the authority to extend the contract under certain circumstances. Pet. App. 20a-21a. The court reasoned that petitioner misread the contracting officers' decision. The court stated that letters from the contracting officers reflected their "conclusion that no basis had been shown for an extension" (*id.* at 20a), not that the contracts precluded all extensions under all circumstances. Judge Bissell dissented on that point. She "read the record as demonstrating that the [contracting officers] gave absolutely no consideration" to their authority to extend (*id.* at 27a).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

1. Petitioner contends (Pet. 9-24) that a contractor involved in a dispute arising from a government contract is entitled to have that dispute adjudicated in the first in-

stance by an Article III court where the judge has life tenure and an irreducible salary. This Court noted in *CFTC* v. *Schor,* 478 U.S. 833 (1986), that Article III protects two interests: (1) " 'the role of the independent judiciary within the constitutional scheme of tripartite government,' " and (2) a litigant's " 'right to have claims decided before judges who are free from potential domination by other branches of government.' " *Id.* at 848 (citations omitted). And the Court ruled in *Schor* that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." *Ibid.* Here, petitioner waived any personal right it had to an Article III forum.[1]

Before passage of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, a government contractor was entitled to an initial adjudication of disputes by a non-Article III forum—either a Court of Claims trial judge (not an Article III judge) or an agency board of contract appeals. That initial decision could then be appealed to the Court of Claims, an Article III court, which reviewed all factual findings under a "presumption of correctness" standard. *Davis* v. *United States,* 164 Ct. Cl. 612, 616-617 (1964). Under the Federal Courts Improvement Act of 1982, a contractor still receives an initial decision by a non-Article III forum—the Claims Court or a board of contract appeals. 41 U.S.C. 606, 609. That decision is then reviewable by the United States Court of Appeals for the Federal Circuit on a de novo standard as

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[1] We do not rely, however, on the court of appeals' rationale on this point. The court ruled that petitioner waived its challenge to the Article I nature of the Claims Court because it proceeded before the Board instead of the Claims Court. But neither forum—the Board or the Claims Court—is an Article III forum. Consequently, petitioner did not willingly forgo an available Article III forum by proceeding before the Board.

to issues of law but on a "clearly erroneous" standard as to questions of fact. *Milmark Services, Inc.* v. *United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

Petitioner entered into the contracts at issue here on April 21, 1982 (Pet. App. 3a). At that time, neither the boards of contract appeals nor the trial judges of the Court of Claims held Article III status. Thus, petitioner understood that any dispute with the government would be resolved without an initial adjudication by an Article III judge. Accordingly, petitioner waived any alleged personal right to an Article III forum when it entered into a government contract with the knowledge that all disputes would be resolved in the first instance by a non-Article III tribunal. See generally *Geldermann, Inc.* v. *CFTC*, 836 F.2d 310 (7th Cir. 1987) (commodity brokerage firm waived any Article III rights when it joined board of trade with rules requiring arbitration of customer claims), cert. denied, No. 87-1584 (Oct. 3, 1988).[2]

2. In any event, petitioner's constitutional challenge is without merit. Article III does not "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Schor*, 478 U.S. at 848. In reviewing Article III challenges, this Court considers "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts [and] the origins and importance of the right to be adjudicated." *Id.* at 851. In the case of a

[2] In *Schor*, this Court held that one Article III claim may not be waived—*i.e.*, whether "a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch" (478 U.S. at 851). For the reasons explained below, this "structural principle" protected by Article III (*id.* at 850) is not violated by the assignment of initial adjudication of government-contract claims to agency boards or the Claims Court.

government-contract claim, an agency board of contract appeals or the Claims Court decides nothing traditionally vested only in Article III courts.

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Court considered whether the Constitution gives a person the right to an Article III forum when the government claims that that person owes it money. In particular, the Court held that Article III does not bar Congress from creating procedures apart from Article III courts to collect a debt due the government from one of its customs collectors. *Id.* at 281. Such actions, the court reasoned, were not traditionally matters for common law judges or Article III courts. *Id.* at 277-282.

The Court in *Murray's Lessee* specifically discussed contract debts allegedly owed to the government. The Court stated that "[w]e apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown." 59 U.S. (18 How.) at 277. The Court observed that contract debts owed the sovereign could be summarily collected by a so-called "writ of extent." *Ibid.* "In regard to debts due [the king] upon simple contract * * * the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt. This commission being returned, the debt found was thereby evidence by a record [in the king's exchequer], and an extent could issue thereon." *Id.* at 277-278. Hence, the Court concluded that a distinction "between public defaulters and ordinary debtors was understood in this country * * * before the formation of the constitution of the United States." *Id.* at 278.

Since *Murray's Lessee*, contract disputes with the government have traditionally been settled outside of an

Article III forum. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742 (1948) (Congress selected non-Article III forum to decide whether contractors made "excessive profits" that must be returned to the Treasury). Indeed, for many years, the standard government contract included a disputes clause providing that agency decisions on questions of law and fact were final. See *United States* v. *Wunderlich*, 342 U.S. 98 (1951); *United States* v. *Moorman*, 338 U.S. 457 (1950). Thus, the Contract Disputes Act, as amended by the Federal Courts Improvement Act of 1982, did not take away from Article III courts any cases that historically had been theirs to decide. Instead of approving a system that would have made a contracting officer's decision final, Congress provided a choice of two forums—agency boards and the Claims Court. No court has ever suggested that a government contractor is entitled to more. See *United States* v. *Rush*, 804 F.2d 645, 647 (Fed. Cir. 1986) (no right to an Article III forum in a case brought by the government for the recovery of money paid to a construction contractor).

Petitioner's reliance on Blackstone (Pet. 16) is misplaced. Blackstone stated that the English Crown sued its subjects for debts on contracts in the Court of the Exchequer by filing an "Information." 3 W. Blackstone, *Commentaries on the Laws of England* 261 (Philadelphia 1772). Although the Court of the Exchequer was both a court of law and a court of equity, Blackstone explained that cases involving the King's debtors were called to answer in the court of equity. *Id.* at 44; see also 1 F. Pollock & F. Maitland, *The History of English Law* 170-171 (1st ed. 1895) (describing the business of the Exchequer in "call[ing] the king's debtors before it" as the work of "an administrative tribunal"). Thus, claims by the sovereign against a subject arising out of contract were hardly "the stuff of the traditional actions at common law

tried by the courts at Westminster in 1789." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment). The Constitution, therefore, does not require an Article III court to adjudicate all aspects of a dispute between the government and a contractor.

3. Petitioner next argues (Pet. 24-30) that the contracting officers improperly failed to exercise any discretion when petitioners sought extensions of time to perform the contracts. That contention does not warrant this Court's review.

Petitioner brought this action as an appeal to the Board from the contracting officer's decision finding petitioner in default on the two contracts. Pet. App. 1a-6a. The contracting officer found, and petitioner does not dispute, that petitioner had not performed its obligations. Hence, petitioner's alleged entitlement to the requested time extensions arose only as an affirmative defense—*i.e.*, as an excuse for its failure to perform. Petitioner had the burden of establishing that it was entitled to such extensions under the circumstances and that the Forest Service's refusal to extend the contracts constituted a first breach of contract. See, *e.g.*, *Cape Fox Corp.* v. *United States*, 4 Cl. Ct. 223, 235 & n.29 (1983) (citing *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1088-1090 (Ct. Cl. 1975)).

The Board found, however, that the Forest Service had not first breached the contracts by failing to grant extensions. Pet. App. 68a-70a. It found that none of the alleged causes advanced by petitioner for its failure to perform the contract was the real reason for its non-performance. Pet. App. 14a. Thus, whether the contracting officers wrongly believed that they lacked discretion to grant extensions is immaterial; petitioners simply did not prove that the government first breached the contract by not granting extensions.

The court of appeals understood this analysis and focused on the Board's *de novo* factual findings (Pet. App. 12a-17a). It upheld the Board's findings that petitioner's purported excuses for its default were entirely without basis in the record.[3] To be sure, the court also observed (*id.* at 20a) that the contracting officers' letters, read as a whole, showed that they understood that they could grant extensions in a proper case. Petitioner disagrees with that observation. But even if the court erred on that factbound question, the ultimate ruling that the government did not commit a first breach by refusing to extend the contracts is still correct and dispositive.

In sum, the Board found, and the court of appeals agreed, that "the underlying cause for [petitioner's] failure to perform the * * * contracts was [petitioner's] economic decision to avoid the higher price of the timber under those contracts." Pet. App. 14a; see also *id.* at 60a-61a, 68a. The two contracts at issue had been obtained with

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[3] Petitioner had requested an extension of the two timber contracts at issue because it allegedly needed to give priority to the removal of timber, under another contract, that had blown down. Pet. 4; Pet. App. 12a-13a, 57a-60a, 67a-68a. But, as the court of appeals stated, the "record shows that [petitioner] did not remove any timber from the * * * [area covered by the other contract] from September through November 1983 – the time during which it had planned to perform the present contracts." Pet. App. 13a. Before the Board and the court of appeals, petitioner offered two more reasons for its non-performance. First, it contended that its performance was delayed by a labor dispute. Pet. App. 15a-17a. In fact, however, the temporary closure of one mill due to a labor dispute occurred when there were no scheduled logging operations under the contracts at issue. *Id.* at 17a. Second, petitioner alleged that it was forced to give priority to the removal of fire-damaged timber under another contract. *Id.* at 12a-13a. The record again showed, however, that no harvesting of that fire-damaged timber occurred until the year after the two contracts were to be performed. *Id.* at 13a-14a.

high bids and petitioner defaulted, not because of unforeseen factors causing legitimate delays, but because it deliberately chose to log other less expensive timber first. *Ibid.* Thus, the Board's factual findings, upheld by the court of appeals, foreclose petitioner's argument that it had a sufficient excuse for its non-performance on the contracts to mandate an extension of time to perform.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00234

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1465

In the Supreme Court of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF GREGORY TIMBER RESOURCES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ARGUMENT

The Government presents new matter on three points: (1) waiver, (2) constitutionality of denial of an Article III trial, and (3) the failure of the contracting officers (CO's) to exercise any discretion when considering extension requests. None of the Government's new matter warrants denial of certiorari.

1. The Government concedes that the Federal Circuit erred in its conclusion of waiver. Br in Opp 4 n. 1. The Government argues, however, that waiver can be based on the fact that petitioner entered into its contracts on April 21, 1982. The Government neglects to mention that the AGBCA rejected this very argument.

The AGBCA first noted that while the Federal Court Improvements Act, Pub L No. 97-164, 96 Stat 25, was signed on April 2, 1982, the Act was not effective until October 1, 1982. Prior to that date, the Court of Claims remained intact as an Article III

tribunal. The AGBCA also found no waiver because:

> "At the time of bid submission and bid auction and the determination that Appellant was the high bidder, the FCIA had not been approved by Congress, let alone enacted or effective. Appellant could not have properly withdrawn its bid or refused award of the contracts after bid opening and being determined to be the high bidder. App B: 38a-39a.

2. The Government argues that Gregory was not entitled to try the Government's claim against it in an Article III court. The Government fundamentally misunderstands the historical role of the Exchequer court in England. Also, each case cited by the Government for the authority of non-Article III courts in contract cases is inapposite. Finally, the Government in effect concedes that this case does not

fall within the "public rights" exception.

(a) The Government's argument is based on a misconception of the role of the Exchequer.

The Government excerpts portions of Blackstone's Commentaries on the Laws of England; Pollock & Maitland's The History of English Law; and Murray's Lessee v. Hoboken Land and Improvement Co. which do not support its proposition, but reflect a misconception of the structure and role of the English courts. Suits by the English crown for money could be brought in any court, but customarily were heard by the Exchequer. The Exchequer not only managed the royal revenue, but also had within it two divisions: a court of equity and a court of common law. 3 Blackstone, Commentaries on the Laws of England 44 (Dawsons of Pall Mall, 1st ed reprint 1966). Its primary business was to enforce the royal scheme of taxation--"to call the king's debtors to account," id.--but Blackstone notes that "all

sorts of civil actions" were heard on the common law side of the court. Id. at 45. While most of the Exchequer's business was on the equity side and concerned tax matters, certain suits, such as a suit by the Government against a private citizen for breach of contract, were accorded a common law judicial hearing analogous to an Article III trial. The common law side of the Exchequer considered cases between the Government and citizens "as between subject and subject," replete with the full panoply of English rights including trial by jury. Id. at 261.

The Government's misunderstanding on this point is apparent when it cites Blackstone for the proposition that "the King's debtors were called to answer in the court of equity." Br in Opp at 7. The "King's debtors" referred to were delinquent taxpayers, who were subject to summary procedures. Similarly, the "king's debtors" referred to in Pollock & F Maitland, The History of English Law,

were taxpayers. Gregory Timber has never contended that delinquent taxpayers ever enjoyed rights of a common law trial.

This misunderstanding is further perpetuated by the Government's heavy reliance on Murray's Lessee v. Hoboken Land and Improvement Co., 59 US (How.) 272 (1855). There, a summary warrant of distress had issued from an executive officer against a Government customs collector after an audit disclosed missing funds. The Court discussed the "summary and severe" English and Colonial procedures against such "public defaulters"--procedures that did not include the right to trial by the Judiciary. Id. at 278. The Court noted that "ordinary debtors"--delinquent taxpayers--were also subject to summary process, although the process was not as severe as for "public defaulters" who make away with public monies. At no time in Murray's Lessee did the Court consider non-tax Government claims against a private

citizen who allegedly breached a Government contract.

(b) Cases cited by the Government for the authority of non-Article III courts in contract cases are inapposite.

The Government cites four cases arguing that non-Article III trial of Government contract claims against a private party can be forced. None of them supports that proposition. United States v. Moorman, 338 US 457 (1950) and United States v. Wunderlich, 342 US 98 (1951) were both actions brought against the Government, and simply uphold contractual clauses making final the Government's determination of certain questions.

Lichter v. United States, 334 US 742 (1948), permitted administrative agencies to determine whether wartime contracts would be revised and "excess profits" returned to the Treasury. The Court expressly declined to rule on the constitutionality of a "redetermination" of the excess profits by the non-Article III Tax Court, because the petitioners

had failed to seek relief. Id. at 791. Lichter does not support the constitutionality of compulsory non-Article III adjudication of Government contract claims.

Finally, United States v. Rush, 804 F2d 645 (Fed Cir 1986) stands for the narrow proposition that non-Article III courts may adjudicate Government claims against a third-party defendant where the Government's claim is for money already paid out to third parties under a contract, or where the third party asserts a claim against the Government. Rush is not authority for non-Article III adjudication of Government claims against private parties for breach of contract.

(c) The Government in effect concedes that this is not a case involving "private rights"

The Government previously contended that Gregory Timber's rights were "public rights," and thus exempt from the exclusive purview of Article III courts. It has omitted that argument in its response before this

court. Gregory Timber understands this to be, in effect, a concession that this is not a case involving the "public rights" doctrine.

3. The Government last argues that the CO's misunderstanding of their authority is immaterial because Gregory "did not prove that the Government first breached the contract by not granting extension." Br in Opp at 8. This misconceives the issue and misdescribes the Government's breach and burden.

Because the CO's believed they had no legal authority to extend the contracts they never reached the factual question of whether the new blowdown on the salvage sale justified extensions. Gregory's argument has never been that the Government materially breached by denying the extension requests. Rather, the Government was in breach when, while the contract was still in effect, the CO's misunderstood their own authority and concluded that they lacked power to grant extensions. As dissenting Judge Bissel explained:

> "*** When a request is made for an extension that could have been granted, the CO incorrectly believed that he lacked authority to grant an extension, and the grant of an extension would have avoided the subsequent default, the contract must be treated as having been terminated for the convenience of the government." App A:27a.

Judge Bissel also correctly noted that "the Government did not argue before this court and the Board did not find that the CO did exercise any legitimate or reasoned discretion in denying Gregory Timber's extension requests." (Emphasis in original); App A:25a.

Concerning the merits of Gregory's extension requests, there is only one relevant question, i.e., whether the CO's could have granted the extensions or whether they would have abused their discretion by doing so. As Judge Bissell noted, the burden is on the Government to prove that the CO's acted correctly in responding to the extension requests. App A: 26a. The Government has never argued, and the

Board and Federal Circuit did not conclude, that it would have been an abuse of discretion for the CO's to have granted extensions. Indeed, the record shows that had the CO's understood their authority, or investigated the facts, they could have granted extensions. The one Judge to have addressed this issue, dissenting Judge Bissel, rightly concluded "that the CO had the discretion to grant or deny the extensions, and was not compelled by law to either grant or deny the requested extensions." App A:25a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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